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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURTON D. LINNE, JACK O. SLATER,
and JOHN C. IMLAY IV,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI *and* APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

The prosecutors procured an indictment alleging that petitioners, as part of a conspiracy to defraud, "established" in early 1984 an entity called the "Bullion Fund" in the Bahamas, for the purpose of illegally secreting monies off-shore. Then, to negate the defense that petitioners had acted without criminal intent, the prosecutors introduced at trial the testimony of an IRS investigator, and argued to the jury, that: (i) the investigator had been unable to discover any corporate existence of the Fund, other than a post-office box in Nassau; (ii) the Fund was merely a "mail drop" petitioners set up to move monies overseas; and (iii) their creation and use of the phony Fund proved petitioners' guilty knowledge of the criminality of all their activities. The jury found petitioners guilty of almost every charge. In fact, however, as evidence uncovered after trial conclusively proved, persons independent of petitioners had established the Bullion Fund in 1983; the Fund was openly registered in the Turks & Caicos Islands, and registered and licensed to do business in the Bahamas; and, well before the dates of the indictment and trial, the investigator had personally interviewed the Fund's registered Bahamian agent, apprised himself of the Fund's true corporate history, structure, and operation, and recorded in an official report accurate findings directly contradicting the indictment, his own trial-testimony, and the prosecutors' summary to the jury.

The District Court denied petitioners' motion for a new trial, and the Court of Appeals affirmed their convictions, notwithstanding petitioners' proofs that:

(i) the prosecutors, in the face of their own agreement and the District Court's order to provide all materials required by *Brady* v. *Maryland*[1] and the Jencks Act[2] prior to trial, knowingly suppressed the exculpatory and impeaching investigator's report; (ii) the prosecutors knowingly introduced the investigator's perjurious testimony, and emphasized in their summation to the jury the very falsity in that testimony as conclusive "evidence" against petitioners; and (iii) the prosecutors presumably suppressed the report in the Grand Jury, and introduced false evidence there as well concerning petitioners' alleged "establishment" of the Bullion Fund.

Under these circumstances—

I. Did the Court of Appeals deny petitioners their rights under the Due Process Clause of the Fifth Amendment by

A. refusing to recognize that the type of pervasive conspiracy to obstruct justice through governmental suppression of evidence and false testimony uncovered here can never constitute mere "harmless error" (or be "immaterial") under this Court's decisions in *Chapman* v. *California*[3] and *Napue* v. *Illinois*[4];

B. employing the "harmless-error" (or "materiality") standard of *United States* v. *Bagley*[5], when *Bagley* itself teaches that the stricter test of *Chapman*

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[1] 373 U.S. 83 (1963).

[2] 18 U.S.C. § 3500.

[3] 386 U.S. 18 (1967).

[4] 360 U.S. 264 (1959).

[5] 473 U.S. 667 (1985).

and *Napue* controls in cases involving knowing use of perjured testimony; and

C. grossly misapplying the *Bagley* test to the egregious facts of this case?

II. Did the Court of Appeals deny petitioners their rights under the Jencks Act, by holding they had "waived" those rights, when the alleged "waiver" was fraudulently induced, in violation of petitioners' constitutional and statutory rights, by the prosecutors' improper suppression of *Brady* and Jencks-Act material prior to trial, and by their introduction of the knowingly false testimony of the IRS investigator on direct examination?

III. Did the Court of Appeals deny petitioners their rights under the Due Process Clause of the Fifth Amendment by, or should that court's decision be subject to reversal under this Court's supervisory powers for,

A. refusing to permit petitioners to add to their appeal a substantial new issue raising abuse of the Grand Jury, based on the discovery of the investigator's *pre*-indictment report that proved the falsity of the indictment; and

B. refusing to require the prosecutors to disclose all evidence presented to the Grand Jury concerning petitioners' alleged "establishment" of the Bullion Fund?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The caption of this petition names all the parties to the proceeding in the Court of Appeals sought to be reviewed here.

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TABLE OF ABBREVIATIONS

D-0 — Defendant Linne's Motion for Bill of Particulars, Cr. No. 85-00223-A (E.D. Va.), Docket No. 11, 12 November 1985.

D-1 — Defendant Linne's Motion for Discovery and Inspection, Cr. No. 85-00223-A (E.D. Va.), Docket No. 12, 12 November 1985.

D-2 — Government's Response to Defendants' Motion for Early Production of Jencks Act Material, Cr. No. 85-00223-A (E.D. Va.), Docket No. 19, 22 November 1985.

D-3 — Government's Response to the Defendants' Motion for a Bill of Particulars, Cr. No. 85-00223-A (E.D. Va.), Docket No. 20, 22 November 1985.

D-4 — Government's Response to Defendants' Motions for Discovery and Inspection and Government's Request for Reciprocal Discovery, Cr. No. 85-00223-A (E.D. Va.), Docket No. 21, 22 November 1985.

D-5 — Application of the United States for the Request for Judicial Assistance, Cr. No. 85-00223-A (E.D. Va.), Docket No. 33, 11 December 1985.

D-6 — Government's Memorandum in Support of Application for Request for Judicial Assistance, Cr. No. 85-00223-A (E.D. Va.), Docket No. 33, 11 December 1985.

D-7 — Defendants' Motion for Evidentiary Hearing to Determine if Criminal Procedures Rule 16(b) Was Violated, Cr. No. 85-00223-A (E.D. Va.), filed 5 September 1986.

T-0 — Transcript of the *pre*-trial hearing of 29 November 1985.

T-1 — Transcript of the trial of 17 December 1985.

T-2 — Transcript of the trial of 18 December 1985.

T-3 — Transcript of the trial of 19 December 1985.

T-4 — Transcript of the *post*-trial hearing of 26 September 1986.

PETITION FOR A WRIT OF CERTIORARI

Burton D. Linne *et alia* hereby petition this Court for a writ of certiorari to review the affirmance of their criminal convictions by the Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Court of Appeals' opinion, entered on 14 August 1987, is unreported, and appears in the Appendix hereto (A) at 1a.

JURISDICTION

Jurisdiction over this petition obtains under Rule 20.1 of the Rules of this Court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Petitioners' claims arise under the Fifth Amendment to the Constitution of the United States and the Jencks Act[1], the texts of which appear at 37a.

STATEMENT OF THE CASE

Petitioners seek reversal of their convictions of and dismissal of the indictment for conspiracy to defraud the United States, mail fraud, and willful failure to file income-tax returns[2] on the grounds that the prosecutors knowingly, intentionally, and maliciously: (i) secured the indict-

[1] 18 U.S.C. § 3500.

[2] 18 U.S.C. §§ 371 and 1341; 26 U.S.C. § 7203 (as to petitioners Linne and Slater only).

ment through withholding of material exculpatory evidence from, and the apparent presentation of false evidence to, the Grand Jury; (ii) refused to disclose promised material exculpatory and impeaching evidence prior to trial; and (iii) introduced and emphasized to the Petit Jury the false testimony of a government agent to destroy petitioners' general defense of lack of criminal intent.

I. The crucial Rideoutte report. What transpired before and during trial can be appreciated only in light of the report of 14 August 1985 of government witness IRS agent James T. Rideoutte, which petitioners obtained (*minus* certain "attachments") on the day of oral argument of this cause in the Court of Appeals.[3] Rideoutte had investigated the structure of and petitioners' connections to the Bullion Fund, a Caribbean-based investment-company the prosecution contended was merely an off-shore "mail drop" petitioners created in 1984 to secrete monies from the IRS, not an independent concern in which petitioners had simply

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[3] The report appears at 10a. Significant events in this case's *pre*-appeal history *post*-dating the report are: indictment (16 October 1985), *pre*-trial hearing on discovery matters (29 November 1985), trial (17-19 December 1985), and hearing on defendants' motion for evidentiary hearing concerning Rideoutte's testimony (26 September 1986).

Unlike petitioners, the prosecutors knew of Rideoutte's report well before and during trial. Indeed, in one *post*-trial, *pre*-appeal memorandum in the District Court, they pretended—without any substantiation—that they had disclosed the report prior to trial, thereby conceding their knowing possession of it then. *See* Joint Appendix filed in the Court of Appeals, at JA316. The government's appellate counsel repeated this unverified claim, too, further amplifying the admission. *See* Brief for the Appellee in the Court of Appeals, at 14. Petitioners and their three trial-counsel, however, denied under oath they ever received the report. *See* Appellants' Supplement to Joint Appendix in the Court of Appeals. Under these circumstances, this Court must presume the prosecutors knowingly withheld the report, until finally ordered to divulge it by the Court of Appeals. *See* Clancy v. United States, 365 U.S. 312, 315-16 (1961); Lutz v. Ragen, 324 U.S. 760, 763-64 (1945); Pyle v. Kansas, 317 U.S. 213, 215-16 (1942).

encouraged their clients to invest without any criminal intent.[4] From inquiries he made in the Bahamas, however, Rideoutte discovered that:

- ***"Neither the police, the Central Bank, nor anyone I spoke with knew anything about any of the [petitioners or their codefendant]."***

- ***The Bullion Fund is not "registered in The Bahamas", but its parent-company, "The Bullion Management Corp., * * * is * * * registered in the Turks & Caicos Islands."***

- ***"The Governor of The Bahamas Central Bank indicated that [a local attorney, Anthony Thompson,] had signatory authority over the [Bullion Fund's] bank account * * *."***

- ***"Thompson * * * was contacted by Gordon Briggs in late 1983 about forming a company * * * and Thompson was to manage the operation locally under Briggs['] direction. The Bullion Management Corp. was formed and bank accounts were opened * * *."***

- ***"According to Thompson, [Sterling] Quant [an employee of Thompson's] and all other officers [of the Bullion Fund] were merely nominees, the principal was Briggs. * * * All disbursements and actions of any consequence were directed by Briggs * * *."***

- ***"I believe that what [Thompson] reported is basically correct * * *."***

- ***"None of the people interviewed would be available to testify since to do so would be in violation of the strict Bahamian secrecy laws. In fact, if it were***

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[4] As will appear anon, this contention and its fraudulent "proof" through Rideoutte's perjurious testimony constituted the fulcrum of the prosecutors' strategy to overturn petitioners' good-faith defense on *all* the conspiracy, mail-fraud, and failure-to-file counts.

known what they told me they could be prosecuted. Actual bank records, of course, are out of the question."

The theory of petitioners' relationship to the Bullion Fund the prosecutors presented to the Grand and Petit Juries, and Rideoutte's trial-testimony concerning his investigation on that score, directly and knowingly contradicted these findings. This contradiction, petitioners contend, fatally corrupted the indictment and trial, denying them Fifth-Amendment and Jencks-Act rights, and casting them in the role of victims of a classic "frame-up".

II. The importance of Rideoutte's false testimony and the suppression of his report to the prosecution's case. The indictment charged petitioners with establishing the American Liberty Information Service (ALIS), which marketed three programs called the Administrative Notice and Declaration of Immunity (ANDI), Citizens for Dollars (CFD), and the Bullion Fund for knowingly fraudulent purposes. According to the prosecution, petitioners represented that ANDI would obtain for participants the status of "non-taxpayers". CFD transferred participants' funds through its domestic bank-accounts to conceal their incomes and assets from the IRS. And the Bullion Fund secreted these monies off-shore. The indictment also charged petitioners Linne and Slater with willful failure to file federal income-tax returns. Petitioners' general defense was that they had operated ALIS, ANDI, and CFD; encouraged participants in those programs to invest in the Bullion Fund, a foreign company established and operated by persons other than themselves; and not filed tax-returns in the good-faith, if mistaken, belief that their actions were legal.

At trial, the prosecution introduced no evidence: (i) specifically describing the illegal aspect of ALIS, ANDI, CFD, or the Bullion Fund; (ii) exposing manifestly bad-faith motivations on petitioners' parts; or (iii) identifying individuals who had actually used ANDI, CFD, or the Bullion

Fund to conceal income or assets illegally.[5] Instead, the prosecution relied on masses of complex documentation and equivocal testimony of a few participants in ANDI and CFD, that supposedly the jury could interpret as evidencing conspiracy and fraud. To secure that interpretation, the prosecutors called Rideoutte, *who claimed under oath he had been unable to locate any official record of the Bullion Fund in the Bahamas.* From this false testimony, the prosecutors argued to the jury that the Fund was merely a "mail drop" petitioners created to siphon money off-shore, and that such surreptitious behavior proved petitioners' awareness of the criminal nature of *all* their activities, demolishing their defense of good faith. The jury accepted this assessment, finding petitioners guilty of nearly every count of the indictment.

Months after trial, petitioners discovered that, contrary to his testimony, Rideoutte had interviewed the former registered corporate agent of the Bullion Fund in the Bahamas (Anthony Thompson), who had described in detail to him the history and operations of the Fund. Based on this revelation, petitioners concluded, not only that Rideoutte's trial-testimony was perjurious, but also that: (i) he must have provided the prosecution with a report summarizing the *true* results of his investigation; (ii) the prosecutors knowingly suppressed this report, violating their duties under *Brady* and the Jencks Act; and (iii) the prosecutors willfully elicited false testimony from Rideoutte, and then deliberately emphasized that testimony in their closing argument, to infect the jury with a prejudice fatal

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[5] *E.g.*, amazingly, although petitioners' good-faith defense turned on whether they, as laymen, had reasonably (mis)read applicable legal materials, including judicial decisions, the District Court flatly stated that "I am not going to start having [the prosecutors] and [petitioners] get into an argument about what law cases say". T-2, at 111. [Abbreviations are defined in the Table of Abbreviations, *ante*, at xi.] Apparently, only petitioners believed that what the law actually said, and how they interpreted its language, were relevant to their intent.

to petitioners. The District Court, however, summarily denied petitioners' motion for an investigation of this web of wrongdoing.[6]

Petitioners appealed, and successfully moved the Court of Appeals to order production of Rideoutte's report. The report in hand, petitioners realized that (iv) the prosecutors must also have known of the falsity of the indictment, and therefore moved to add to the appeal a question on abuse of the Grand Jury, and to require disclosure of the suppressed attachments to the report and all Grand-Jury evidence relating to their alleged status as principals of the Bullion Fund. The Court of Appeals denied this motion,[7] and affirmed the convictions in an unpublished *per curiam* opinion—*without so much as mentioning petitioners' charges of conspiracy to obstruct justice, or the undeniable proof thereof in the Rideoutte report itself.* This petition followed.

III. Operation of the conspiracy to obstruct justice among the prosecutors and Rideoutte. The record reveals a pervasive conspiracy among the prosecutors and Rideoutte, extending from the Grand-Jury proceedings through trial.

A. The prosecutors' pre-*indictment and* pre-*trial knowledge of the Bullion Fund, and their false claims concerning petitioners' relationship thereto.* Pursuant to a search warrant of 22 June 1984, the prosecution seized a "Bullion Fund Pamphlet" pinpointing the location of the Bullion Management Corporation in the Turks & Caicos Islands; and obtained various magazine stories identifying Gordon Briggs as the principal of the Fund, and a CFD newsletter describing petitioners' then-recent discovery of the Fund and meeting with Briggs.[8] On 4 July 1985, the prosecution elicited further intelligence from the Attorney General of

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[6] T-4, at 8-9.

[7] A at 9a.

[8] These materials appear in Government Exhibit 113, Defendants' Exhibits 20 & 22, and Exhibit 1 *to* D-7.

Bermuda on a monetary transaction between the Bullion Fund and CFD, involving Briggs and petitioner Linne.[9] And shortly after 14 August 1985, the prosecution received Rideoutte's report. These materials established petitioners' lack of managerial status with the Fund.

Notwithstanding, on 16 October 1985 the prosecutors obtained an indictment charging petitioners had formed, directed, and operated the Bullion Fund—and, specifically, had met in Bermuda and elsewhere during early 1984 for the purpose of "establishing" it.[10] Moreover, on 8 November 1985, thanking the Attorney General of Bermuda for his "assistance" concerning the Bullion Fund "*which enabled us to bring indictment*", the prosecutors' superiors re-iterated the canard that petitioners "set up the 'Bullion Fund'".[11] Then, in a motion for "letters rogatory" of 11 December 1985, the prosecutors informed the District Court that they "intend[ed] to prove at trial that * * * [petitioners] set up the 'Bullion Fund'".[12] These statements indicated the crucial role of the prosecutors' fraudulent Bullion-Fund theory in misleading the Grand Jury, the centrality of that deceit to the impending trial, and the absolute necessity for them to suppress the Rideoutte report from scrutiny by the Grand Jury, the District Court, the Petit Jury, and petitioners.

B. The prosecutors' duplicitous withholding from petitioners of the Rideoutte report. The prosecutors' *pre*-trial strategy involved duping petitioners and the District Court into assuming that the Rideoutte report did not exist.

1. Withholding of Brady *material.* Relying on *Brady*, petitioners demanded discovery of

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[9] *Described in* Exhibit 3 *to* D-6.

[10] Indictment in Cr. No. 85-00223-A, at 2, 7, 18, 21.

[11] Exhibit 3, *ante* note 9 (emphasis supplied).

[12] D-5, at 3.

> statements summarized in * * * I.R.S. * * * reports * * * by persons having knowledge of [petitioners'] alleged criminal activities

and

> all evidence which is or may be construed to be exculpatory * * * in the possession * * * of the U.S. Attorney * * * or any * * * other agencies who * * * participated in * * * the investigation * * * of this case.

In response, the prosecutors twice promised to produce all exculpatory evidence.[13] Then, at a *pre*-trial hearing, prosecutor John Conroy answered "Yes" to the District Court's admonition that, "[i]f there is exculpatory evidence, it must be specified as such and given to [petitioners'] counsel [at least ten days in advance of trial]. You understand that * * *?"[14] Notwithstanding Conroy's representation and the District Court's order, the prosecutors produced *no* exculpatory material relating to the Bullion Fund.

2. Withholding of Jencks-Act material. Responding to petitioners' request for Jencks-Act statements, the prosecutors promised such "material of the witnesses whom the United States intends to call in its case in chief five (5) days prior to * * * trial".[15] And in response to petitioners' motion for particulars on the allegation they had "established" the Bullion Fund, the prosecutors averred that said Jencks-Act material "will * * * furnish the defense with much of the information * * * requested".[16]

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[13] D-1, ¶¶ 8, 12; D-4, at 6; D-2, at 1-2.

[14] T-O, at 17-19.

[15] D-2, at 2. *See also* D-3, at 2 (Jencks-Act statements will be furnished "well in advance of trial"); D-4, at 4 (Jencks-Act statements consisting of "Government internal reports and memoranda" will be furnished "five (5) days prior to * * * trial").

[16] D-0, ¶¶ 46-47; D-3, at 2.

On the strength of this representation, the District Court denied petitioners' motion, holding the prosecution's response "adequate".[17] However, the prosecutors produced *no* Jencks-Act statement of Rideoutte.

From this pattern of promises and non-performance, petitioners naturally, if mistakenly, assumed that no *Brady* or Jencks-Act material on the Bullion Fund existed.[18]

C. The prosecutors' deception of the District Court, petitioners, and the Petit Jury regarding petitioners' status as "principals" of the Bullion Fund. Petitioners based their defense to all charges on good-faith (mis)interpretations of the law. The prosecution, conversely, claimed petitioners' actions—in particular, their involvement with the Bullion Fund—evidenced criminal intent. Indeed, in his opening statement, prosecutor Thomas Blondin denigrated the Bullion Fund as an evolutionary part of the "scheme * * * beyond CFD", established by petitioners "to hide [money], to conceal it [off-shore]".[19] But, although admitting they had recommended and invested their own and their clients' money in the Fund, petitioners denied they had established or operated it.[20]

To undermine petitioners' good-faith defense on the Bullion Fund, the prosecutors called two witnesses: Rideoutte, and Marian Snyder, an employee of a private concern that

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[17] T-0, at 8, 19.

[18] This duplicitous *modus operandi* the prosecutors did not confine to evidence on the Bullion Fund. *See* T-2, at 249-50; T-3, at 25-26, 73-75, 83-88; Affidavit of John C. Imlay IV *in* Appellants' Supplement to Joint Appendix in the Court of Appeals.

[19] T-1, at 26, 27.

[20] Petitioner Linne: "I am not any part of the Bullion Fund. I didn't create it and I have no connection with it." T-2, at 234. *See also id.* at 189-91 (Linne met Briggs, but did not know who Anthony Thompson was).

provided ALIS with a post-office box in Washington, D.C.[21] Rideoutte's testimony—as amplified later by prosecutor Conroy—demolished petitioners' denial of formal involvement with the Fund.[22]

Identifying himself as an agent stationed in Nassau, Bahamas, who represents the IRS "throughout that part of the Caribbean * * * securing information that relates to inquiries we have from the States", Rideout related how he had investigated the Bullion Fund "a couple months" before trial, "to determine what their presence if any was in the Bahamas, whether they were in business there or not", and had "checked with the police, registrar of companies, chamber of commerce, the Governor of the Central Bank of the Bahamas, * * * the post office", and two individuals, Sterling Quant and Anthony Thompson. This much, as his report later revealed, was true. But then, after the District Court at the prompting of prosecutor Blondin permitted him to testify to "the lack of records", Rideoutte pretended to have found *no* record of the Fund with the Bahamian registrar of companies, chamber of commerce, or police: "They had never heard of them." This much was false.

Unfortunately, deprived of the report and unaware of who Quant and Thompson were, petitioners could muster only a feeble cross-examination, eliciting but two points the significance of which emerged only after receipt of the report. Responding to a question about the Bullion Fund's

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[21] For Snyder's testimony, *see* T-1, at 199-200. On its face, this evidence was innocuous, inasmuch as Snyder stated it was "[a]bsolutely" "a very common practice for a business to use such a post office box service", and that "some of [her employer's] customers are Government agencies". *Id.* at 201. The prosecution insinuated the testimony, however, to color its argument to the jury that the Bullion Fund was merely an off-shore "mail drop" similar to the one petitioners maintained in Washington. *See post,* p. 13.

[22] Rideoutte's complete testimony appears at 13a.

post-office-box number, Rideoutte stated: "[I]t is in my report. I assume they [*i.e.*, presumably, petitioners] have it." Then, he added: "I see Box N8669 here in my notes." In fact, *no* post-office-box number appears in Rideoutte's report. Rideoutte could not possibly have "assume[d petitioners] ha[d his report]" and nevertheless dared to testify as he did. And the presence in his "notes" of "Box N8669" proves those "notes" were *not* the report later disclosed to petitioners, but instead some *other* document.[23] But the District Court, the Petit Jury, and petitioners knew none of this. Rather, everyone in the courtroom other than petitioners must have inferred from Rideoutte's testimony that the Bullion Fund had no real organizational existence independent of petitioners; that petitioners *must* have established and operated it themselves (for why else would they have invested their own, and their clients', monies in a non-existent entity?); that therefore petitioners *must* have been lying when they denied their organizational role in the Fund; and that these lies necessarily imported their guilty awareness of the criminal nature of *all* their activities.

In their summation to the jury, the prosecutors displayed what Blondin claimed were four "charts * * * based upon the evidence * * * introduced", "to assist * * * the jury in understanding the case", by illustrating the intimate interrelationship the prosecutors imagined existed among ALIS, ANDI, CFD, and the Bullion Fund.[24]

Prosecutor Conroy then summed up the government's case, focussing on petitioners' supposedly criminal intent evidenced by their involvement with the Fund, as "exposed" by Rideoutte's testimony.[25]

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[23] *See* A. at 10a-12a.

[24] T-3, at 92-93. The charts appear at 35a.

[25] The complete argument appears at 18a.

With respect to the charges of willful failure to file tax-returns, Conroy began,

> the remaining element for you [the jurors] to decide is the willfulness of these individuals * * *.
>
> Now, * * * [w]illfulness is established through inferences. * * *
>
> * * * [Petitioner] Slater used the services of [CFD] to conceal his income. * * *

Of course, on the prosecution's charts, the jury could see the many alleged monetary links between CFD and the Bullion Fund.

Then, continued Conroy, "the evidence we heard in this case is replete with * * * overt acts", "the third element" of the alleged conspiracy. Describing his first chart as "an organizational chart of [ALIS]", Conroy portrayed "[t]he Bullion Fund" as "a new step [for petitioners beyond CFD], a more sophisticated step involving offshore moneys". The "second element of the * * * conspiracy", he went on, "is an agreement to defraud". "That fraud", he ventured, "took two forms", of which "[t]he second object was to impede the collection of [tax] revenue * * * through [CFD] and the Bullion Fund, moving money off shore, * * * away from the jurisdiction of the * * * government".

"Now you will notice", Conroy prompted, "there was a progression to this scheme * * * the ANDI program * * * [t]he next step," CFD. "[W]hat is CFD? CFD is nothing more than a money laundering operation." Pointing to his second chart, he recounted that CFD made "deposits to the Bullion Fund, money offshore." Then, using the third chart, Conroy colored for the jurors "how the Bullion Fund transaction occurred. * * * This * * * shows you the path, shows you the machinations [petitioners] went through to move money off shore".

Of course, petitioners never denied these transactions had taken place, challenging only the prosecutors' insin-

uation of criminal intent behind them. To this defense, Conroy turned:

> Ladies and gentlemen, the evidence * * * consists for the most part of financial records * * *. What you need to do is go into the mind of the defendants in this case. * * *
>
> [Government Exhibit] 120 is a * * * notice by [petitioner] Linne. It indicates the purpose and the scope of the Bullion Fund. * * *
>
> * * * *[W]hat was the Bullion Fund? We heard revenue representative Rideout testify that he went to the registry of companies and found no Bullion Fund, found no records. What did he find? He found a mail drop. A mail drop just like the one * * * in the District of Columbia.* * *
>
> Now, with respect to the mail fraud counts, *the mail fraud counts involved the same scheme* * * *.
>
> * * * I submit to you the evidence in this case clearly establishes [an intent to defraud].
>
> *Mr. Linne demonstrates that intent through his promotion of the Bullion Fund* * * *.
>
> * * * * * *
>
> Mr. Linne didn't know the principals [of the Bullion Fund]. He told you that. *Mr. Rideout couldn't find the principals. I submit to you the Bullion Fund was nothing but a coverup to conceal the money and assets of the participants of [CFD]* * * *. [Emphasis supplied.]

In response, petitioners' trial-counsel touched the heart of Conroy's summation: "[Conroy] would have to [*sic*, the context suggests 'you' was meant] believe in one of his charts when he showed you the organization of ALIS that the Bullion Fund was created by [petitioners]." But then,

befuddled by Rideoutte's testimony, counsel accepted Conroy's false statement that "Rideoutte couldn't find the principals [of the Fund]", conceding that the prosecution went "to a lot of expense to find out if there was such a fund", and lamely suggesting that "may be * * * they didn't find out about it because they didn't look in the right place".[26]

All of this, petitioners believe—Rideoutte's seemingly conclusive testimony, unimpeached by cross-examination; the prosecution's charts connecting everything to the Bullion Fund; Conroy's summation emphasizing what Rideoutte "couldn't find" and how petitioners demonstrated an intent to defraud through "promotion of the Bullion Fund"—devastated their defense of good faith. For evidence showing *petitioners had created a "mail drop" to hide money off-shore, so secret even the IRS could not ferret it out,* would convince any juror following the District Court's instructions that petitioners *must* have recognized the illegality of *that one* aspect of their activities, and therefore had no good-faith defense to *any* of the charges.[27] Thus, given Rideoutte's perjurious testimony and the prosecutors' intentional emphasis of it, the jury had but one probable, albeit misguided course: to convict.

IV. Exposure of the conspiracy to obstruct justice. Unforeseen by the prosecutors and Rideoutte, however, the benevolent hand of Providence intervened a few months after trial, guiding two of petitioners' friends, Lynd and Burris, to the Anthony Thompson Rideoutte had admitted

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[26] T-3, at 124. Counsel had no reason then, of course, to presume that Rideoutte *had* looked in the right place, but chosen to *lie* about what he found.

[27] *See* the District Court's instructions in T-3, at 153 (finding of "one of the overt acts, *it does not matter which one*" establishes "complete" proof of the conspiracy as "to *every* person * * * willfully a member" thereof), 155 (evidence must establish only that "*one* or more of the means * * * described in the indictment" were used to "accomplish *some* object" of the conspiracy) (emphasis supplied).

contacting.[28] Thompson confirmed Rideoutte had interviewed him in the summer of 1985 in "a very long conversation", but surprised his hearers by saying: "the IRS knows all about the Bullion Fund". Told how Rideoutte testified he found nothing on the Fund, Thompson responded:

> somebody is conning somebody here. The government is hiding something. * * * [Rideoutte] asked me what I knew about the Bullion Fund. I told him what I knew.
>
> * * * * *
>
> [Rideoutte] told us that he had every copy of every bank deposit that went in to Gordon Briggs' bank accounts in Nassau. He seemed to know quite a bit about Gordon Briggs and his Bullion Managing Company.

What Thompson disclosed about the Bullion Fund corroborated every important particular of Rideoutte's suppressed report. First, he confirmed that petitioners Linne, Slater, and Imlay had nothing to do with the Fund's corporate organization or operation: "I have never heard any of those names." Second, Thompson personally drew up the organic documents of the Bullion Management Corporation in early 1983, whereupon Briggs registered the corporation in the Turks & Caicos Islands. Third, Thompson's employee Quant (whom Rideoutte also admitted meeting) was the initial president and treasurer, and a director, of Bullion Management. Fourth, Thompson openly served as the Fund's registered agent in the Bahamas until 1 January 1985, when he surrendered that authority to the Caicos Worldwide Management Company in the Turks & Caicos Islands.

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[28] Their affidavits appear as exhibits to D-7.

To satisfy himself of petitioners' good faith on this question, the undersigned counsel of record conducted his own investigation by contacting Thompson before filing their appeal.[29] Thompson re-affirmed what he had told Lynd and Burris, adding that he "obviously" informed Rideoutte of the corporate registration of the Bullion Fund in the Turks & Caicos Islands, and that the Fund's structure was "understood" during the interview. Thompson also explained that he registered the Bullion Fund with the Central Bank of the Bahamas, and recalled obtaining a license for it do business on those islands.

Relying on the affidavits of Lynd and Burris and other new documentation, petitioners moved the District Court for an evidentiary hearing, preliminary to a motion for a new trial. The court denied the motion out of hand.[30] But, on appeal, the Court of Appeals granted petitioners' motion to divulge Rideoutte's report, verifying what Lynd and Burris recounted, and for the first time completely exposing the depth and malignancy of the prosecutors' conspiracy to obstruct justice, extending from the Grand-Jury proceedings, through *pre*-trial and trial, even unto this very day.

Yet, notwithstanding these proofs of a miscarriage of justice, the Court of Appeals affirmed petitioners' convictions, denied their motion to add a new issue of Grand-Jury tampering, and refused to compel disgorgement of the evidence of prosecutorial wrongdoing before the Grand Jury.

Petitioners now seek this Court's intervention.

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[29] Counsel of record's affidavit appears in the Joint Appendix filed in the Court of Appeals, at JA603.

[30] T-4, at 9: "[T]his is no more than an attack on the credibility of Rideout * * * nor is this the type of withholding of exculpatory evidence that would warrant a new trial".

REASONS FOR ALLOWANCE OF THE WRIT

This case demands review because it embodies in every disgusting feature one of the three sickening affronts to justice most abhorred, condemned, and feared in the American tradition: the *"frame-up"*.[31] Reasons for allowing the writ can be couched in the bloodless language of court rules;[32] but the sordid reality of petitioners' ordeal is that prosecutors Blondin and Conroy, IRS agent Rideoutte, and surely yet-unknown others in authority have apparently perpetrated numerous crimes,[33] besmirched the integrity of the entire judicial system, and destroyed the lives of petitioners and their families in the name of "law enforcement" and the "government".[34] Moreover, the Court of Appeals' callous, cynical, and even craven disposition of petitioners' appeal has only exacerbated the shameful be-

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[31] These three are *lynchings* (convictions without defense in an atmosphere of hysteria), *coerced confessions* (convictions secured through compulsory self-incrimination), and *frame-ups* (convictions resulting from hidden conspiracies to use knowingly false evidence). *See* State v. Bissell, 106 Vt. 80, 92-93, 170 Atl. 102, 108 (1934) (classic definition of "frame-up"). Frame-ups are such well-recognized travesties of justice within American folkways that the category merits a separate subject-entry in the six-volume *American Film Institute Catalog of Motion Pictures Produced in the United States, Feature Films* (K.W. Munden ed., 1971). Perhaps, though, *sub specie aeternitatis* petitioners should console themselves by reflecting that far greater than they have suffered such. *See* Matthew 26:57-63; Mark 14:55-59.

[32] *See* Supreme Court Rule 17.1(a), 17.1(c).

[33] *See* 18 U.S.C. §§ 2-3 (aiding and abetting), 4 (misprision of felony), 241 (violation of civil rights), 371 (conspiracy to defraud the United States), 1001 (false statements), 1341 and 1343 (mail and wire fraud), 1503 (obstruction of justice), 1621-22 (perjury and subornation of perjury).

[34] Their actions, of course, were "in the name" of the "government" only. For "government" can hardly be said even to exist, where its officials wantonly violate the laws. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 659 (1961).

trayal of rudimentary precepts of fair play those conspirators foisted upon the Grand and Petit Juries and the District Court, leaving to this Court alone the burden—and, in honor, the inescapable duty—of closing this dark and disgraceful chapter in American legal history.

I. The Court of Appeals blundered by treating the pervasive conspiracy to obstruct justice uncovered here as within the "harmless-error" rule; by employing the "harmless-error" test of *Bagley*, when the more-rigorous standard of *Chapman* and *Napue* control in cases involving knowing use of perjured testimony; and by misapplying the *Bagley* test to the facts of this case.

The plot to assassinate justice discovered in this case is undeniable. Rideoutte's testimony teems with lies or "negative pregnants" but a few Angstrom Units removed from lies.[35] The prosecutors knew of its falsity. Indeed, for that

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[35] *Lies* — The falsity of the following statements, judged against the contents of the Rideoutte report and the affidavits relating what Anthony Thompson said, implies their perjurious character. *E.g.*, United States v. Magin, 280 F.2d 74, 76-78 (7th Cir. 1960); Young v. United States, 212 F.2d 236, 240-41 (D.C. Cir. 1954). (i) Prosecutor Blondin confirms to the District Court that Rideoutte's testimony will evidence "a lack of record". (ii) Rideoutte claims he "checked with * * * [the] registrar of companies, * * * the Governor of the Central Bank of the Bahamas, [and] a couple of attorneys [*i.e.*, Thompson and Quant]" and found nothing. (iii) Rideoutte claims he inquired in "police files, records"; but "[t]hey had never heard of [the Bullion Fund]". (iv) Rideoutte claims his "report" contains the post-office-box number of the Bullion Fund.

Negative pregnants — By "negative pregnant" petitioners mean an implication that a fact exists when it does not, or a statement not itself inaccurate but purposefully creating a false impression. *See, e.g.*, Alcorta v. Texas, 355 U.S. 28, 31 (1957); Turner v. Ward, 321 F.2d 918, 920-21 (10th Cir. 1963); Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967). (i) Rideoutte correctly says he "tried to determine what [the Bullion Fund's] presence if any was in the Bahamas, whether they were in business there or not", and later repeatedly denies finding certain

reason, they also knew of the falsity of the indictment,[36] which the Bullion-Fund theory had "enabled [them] to bring" in the first place.[37] And their intentional reliance on the perjury is irrefutable.[38]

The "materiality" of (or prejudice to petitioners through) the prosecutors' fraud is equally patent. ***First,*** the prosecutors structured their case at trial around the Bullion-Fund theory, and the theory around Rideoutte's false testimony: (i) Not only did the indictment bristle with Bullion-Fund allegations, but also, according to the prosecutors themselves, the Bullion-Fund theory "enabled [them] to bring indictment" at all.[39] (ii) Marian Snyder's testimony facilitated the prosecutors' fictitious characterization of the Bullion Fund as simply another of petitioners' "mail drops"—and makes no tactical or evidentiary sense otherwise.[40] (iii) Rideoutte falsely established the "lack of records", enabling Conroy to caricature the Bullion Fund as merely "a coverup to conceal * * * money". (iv) Conroy's extensive remarks came at the most influential stage of the trial, were calculated to impute guilt to petitioners, and struck at the heart of their defense by "mak[ing their]

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specified records, leaving the jury to conclude *no* evidence of the Fund's business-activities existed. (ii) Rideoutte denies he found any "registration" of the Bullion Fund in the Bahamas, using the term to mean "being incorporated" in the narrowest sense, but all the while aware the Fund was "registered" in other legitimate senses in those islands and "registered" even in his limited sense in the Turks & Caicos Islands.

[36] *See ante,* note 10 & accompanying text.

[37] *See ante,* note 11 & accompanying text.

[38] *E.g.,* prosecutor Blondin's agreement with the District Court on Rideoutte's finding "a lack of record"; prosecutor Conroy's summation to the Petit Jury that Rideoutte "found no Bullion Fund, found no records", and "couldn't find the principals".

[39] *Cf.* Giglio v. United States, 405 U.S. 150, 154-55 (1972).

[40] *See ante,* note 21.

version of the evidence worthless".[41] And (v) the prosecutors' charts, visually linking everything to the Bullion Fund, projected into the jurors' minds the logical mirage that the purported "fraud" of the Fund should be tied *back to all other* of petitioners' activities.

Second, the prosecutors designed the Bullion-Fund theory to undermine petitioners' good-faith defense. As the charts implied, by "proving" petitioners' intent to defraud with respect to the Fund, the prosecutors could argue—and the jury could conclude—(as both did) that petitioners recognized the criminality of everything else. Indeed, Rideoutte's false testimony as to "a lack of record" served no other conceivable purpose. To characterize this as merely "prejudicial" to petitioners minimizes its impact.

Third, the Bullion-Fund theory in fact "enabled [the prosecutors] to bring indictment" *according to their own estimation,* and must be deemed as likely to have swayed the Petit as the Grand Jurors. For the theory was obviously designed to render *all* the proceedings in this case fundamentally unfair *ab initio,* to preclude decisions based on rational assessments of real evidence, and to divert the juries from the truth respecting the decisive issue *sub judice.*

Thus, to imagine (as did the Court of Appeals) that Rideoutte's "report was not material to the question of [petitioners'] intent to defraud", and that his testimony "was confined to a matter largely collateral to the charges" and "not significant on the question of * * *intent", is asinine.[42]

A. The Court of Appeals' fundamental error lay in disregarding the premonishment of *Chapman* that "there are some constitutional rights so basic to a fair trial that their

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[41] Bruno v. Rusher, 721 F.2d 1193, 1195 (9th Cir. 1983); Chapman v. California, 386 U.S. 18, 24-26 (1967).

[42] A at 6a-7a.

infraction can *never* be * * * harmless error".[43] *Freedom from a pervasive frame-up is one of them.*

The abstract "truth" of a conviction is irrelevant where techniques offensive to a civilized system of justice—such as coerced confessions—are employed to obtain "evidence" against an accused. Such violations of basic rights can never be "harmless", because those rights "protect important values * * * unrelated to the truth-seeking function of the trial", and defend against practices "revolting to the sense of justice".[44]

A conspiracy to obtain an indictment and conviction through knowing suppression of exculpatory evidence and introduction of perjurious testimony is paradigmatically the type of "fundamental and pervasive" constitutional error that "require[s] reversal *without regard to the* [*other*] *facts* * * * of the * * * case".[45] As *Mooney* held,

> [fundamental conceptions of justice] cannot be deemed * * * satisfied * * * if [the prosecution] has contrived a conviction through the pretence of a trial which in truth is but * * * a deliberate deception of court and jury by the presentation of testimony known to be perjured. *Such a contrivance * * * is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.*[46]

And only by outlawing systematic frame-ups as *per se* constitutional violations can this Court hope to protect the

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[43] 386 U.S. at 23 (footnote omitted; emphasis supplied)

[44] *E.g.*, Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); Payne v. Arkansas, 356 U.S. 560, 568 (1958); Rose v. Clark, ___ U.S. ___, ___, 106 S. Ct. 3101, 3111 (1986) (Stevens, J., concurring in the result); Miller v. Fenton, 474 U.S. 104, 109 (1985).

[45] Delaware v. Van Arsdall, ___U.S. ___, ___, 106 S. Ct. 1431, 1437 (1986) (emphasis supplied).

[46] Mooney v. Holohan, 294 U.S. 103, 112 (1935) (emphasis supplied).

integrity of the judicial system,[47] encourage public respect for and confidence in law,[48] and enforce the self-evident and overriding duty of prosecutors *not* to convict, to prosecute, or to allow perjured testimony to be used against the innocent.[49]

Alternatively, this Court's supervisory powers can command a like result on non-constitutional grounds.[50]

B. Even were the Court of Appeals correct to assume "harmless-error" analysis permissible here, its use of the *Bagley* test flies in the face of the clear holding by five Justices in *Bagley* that the stricter standard of *Chapman* and *Napue* controls where perjured testimony is involved.[51]

Under *Chapman's* requirement that "the beneficiary of a constitutional error * * * prove beyond a reasonable doubt that the error * * * did not contribute to the verdict",[52] the "materiality" (or lack of "harmlessness") of the prosecutors' Bullion-Fund fraud *ipsa loquitur*. If the Fund was "immaterial" to petitioners' defense, it must have been equally "immaterial" to the prosecution's case-in-chief—*yet the prosecutors and Rideoutte enmeshed them-*

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[47] *E.g.*, Mapp v. Ohio, 367 U.S. 643, 659 (1961); Weeks v. United States, 232 U.S. 383, 391-92, 394 (1914).

[48] *E.g.*, Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring in the result).

[49] *E.g.*, United States v. Wade, 388 U.S. 218, 256 & n.5 (1967) (White, J., dissenting in part and concurring in part); United States v. Brawer, 367 F. Supp. 156, 169 (S.D.N.Y. 1973) (a "precept * * * as old as our legal system"); California v. Trombetta, 467 U.S. 479, 485 (1984); United States v. Grayson, 438 U.S. 41, 54 (1978).

[50] *See* Mesarosh v. United States, 352 U.S. 1 (1956).

[51] *Contrast* A at 6a-7a *with* Bagley, 473 U.S. at 678-80 & nn.8-9 (opinion of Blackmun and O'Connor, JJ.); 704 n.6, 706 (opinion of Marshall and Brennan, JJ., dissenting); and 711 n.6 (opinion of Stevens, J., dissenting). *See also* United States v. Agurs, 427 U.S. 97, 103 (1976).

[52] 386 U.S. at 24.

selves in a conspiracy fraught with felonious conduct to foist his false testimony on the Petit Jury. What further misbehavior could better evidence the material character of the perjury *in the prosecutors' own estimation,* or their fear that, without it, their case would founder on petitioners' good-faith defense?[53]

If, conversely, "materiality" is not self-evident, the record supplies every factor necessary to find constitutional prejudice at the minimal level permitted by *Napue.*[54] The indispensability of Rideoutte's false testimony is beyond cavil. The testimony itself was not cumulative. Rideoutte's statements not only were uncorroborated by other, independent witnesses or the undisputed facts of the case (for how could such lies square with the truth?), but also were contradicted by petitioners on the essential thrust that the Bullion Fund was only a "mail drop". Petitioners' cross-examination was merely an empty gesture, because the prosecutors' conspiracy disabled their trial-counsel from acting effectively.[55] And the perhaps untainted residue of the prosecution's case did not "overwhelmingly preclude" or "affirmatively negat[e]" petitioners' good faith.[56]

C. Finally, even if the *Bagley* test applies here, the Court of Appeals neglected to consider that a "reasonable

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[53] *Compare* Napue, 360 U.S. at 270-71, *with* J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3d ed., 1940), Vol. 2, § 278, at 120: "It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood* • • • in the preparation and presentation of his cause • • • indicat[es] • • • consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact of the cause's lack of truth and merit."

[54] These factors are listed in Van Arsdall, 106 S. Ct. at 1438.

[55] *See* Bagley, 473 U.S. at 683-84; Van Arsdall, 106 S. Ct. at 1440 (Marshall, J., dissenting); Strickland v. Washington, 466 U.S. 668, 711-12 & n.6 (1984) (Marshall, J., dissenting).

[56] *Cf.* Francis v. Franklin, 471 U.S. 307, 325 (1985); Rose, 106 S. Ct. at 3108 & n.10.

probability" of "materiality" under *Bagley* is only "a probability sufficient to undermine confidence in the outcome [of the trial]".[57] The Court of Appeals might mischaracterize Rideoutte's report as merely "*possibly* impeaching" and his testimony as "*not* significant on the question of * * * *intent*".[58] But, once the imbecilities of its opinion are stripped away, and Rideoutte's report correctly described as *conclusively impeaching*, and his testimony as *crucial* to both the charges and petitioners' good-faith defense, "confidence" in the outcome of the trial must be, not simply "undermine[d]", but obliterated in any reasoning mind. Indeed, that the report is *merely* impeaching suffices under *Bagley* to compel reversal here.[59]

II. The Court of Appeals erred by holding petitioners had "waived" their Jencks-Act rights, when any supposed "waiver" was fraudulently induced by the illegal machinations of the prosecutors and Rideoutte.

The Court of Appeals' theory of "waiver" is a pastiche of errors.[60]

A. If the Jencks Act imposed on petitioners a duty to request production of Rideoutte's report *at* trial, the prosecutors extinguished that duty when they agreed to divulge all Jencks-Act and *Brady* material *five days before* trial.[61] Had the prosecutors fulfilled this undertaking,

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[57] *Contrast* A at 6a *with* 473 U.S. at 682.

[58] A at 6a-7a (emphasis supplied).

[59] *Contrast* 473 U.S. at 676, 683-84 *with* A at 7a.

[60] *See* A at 6a.

[61] The Court of Appeals trivialized the prosecution's liability as a "promis[e]" or "concession" without legal force. But, on the strength of this promise the District Court denied petitioners' motion for a bill of particulars, presuming the prosecution's *pre*-trial production would be "adequate". *See ante*, notes 15-17 & accompanying text. How the District Court denied petitioners' motion without thereby imposing an enforceable counter-duty on the prosecutors passes understanding.

petitioners' original Jencks-Act obligation would not be even arguably relevant. However, the prosecutors knowingly refused to make *pre*-trial disclosure. Therefore, even if petitioners' original Jencks-Act duty could have been resurrected by their failure in fact to receive the report prior to trial, that that failure derived from the prosecutors' illegal conduct extinguished and excused non-performance of petitioners' duty. Or, if "waiver" obtains here, *the prosecutors* waived—or, better, *forfeited* —*their* Jencks-Act right to require petitioners to take affirmative action at trial.

B. Moreover, non-performance of petitioners' Jencks-Act duty was induced by the web of darkness the prosecutors and Rideoutte spun both before *and during* trial, rather than ever being a freely "intentional relinquishment or abandonment" of petitioners' rights.[62] Specifically, prosecutor Blondin misled everyone into believing Rideoutte's testimony would reveal only "a lack of record". Rideoutte baldly lied that the Bahamian authorities "had never heard of" the Bullion Fund. Petitioners were ignorant of its organizational particulars.[63] Moreover, that the prosecutors had divulged nothing connected with Rideoutte prior to trial deceived petitioners into believing the "notes" Rideoutte held were neither exculpatory nor impeaching.[64] And that deception caused their counsel to eschew production, so as to escape "the dilemma, which trial lawyers seek desperately to avoid, that examination on the [document] would only reinforce the witness' testimony whereas failure to use it would do the same".[65] Furthermore, the

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[62] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[63] *See* the affidavits in Appellants' Supplement to Joint Appendix in the Court of Appeals.

[64] *Compare* the situations described in Bagley, 473 U.S. at 683-84; Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 845 (4th Cir. 1964).

[65] United States v. Annunziato, 293 F.2d 373, 382 (2d Cir. 1961).

"*notes*" Rideoutte held were *not* his *report*, but surely a "plant" concocted to corroborate his false testimony and cast petitioners' trial-counsel as *i pagliacci* before the jury.[66]

C. The "precedents" the Court of Appeals cited are not helpful, either. In *Lemus*, "no request for the * * * reports was *ever* made"; whereas, here, the prosecutors bound themselves to *pre*-trial disclosure. In *Peterson*, "the Government Attorney was neither in possession of nor aware of the existence of [the document] * * * prior to trial"; the defendants "knew in advance the substance of [the witness'] testimony"; and "the Government made an *accurate* proffer of the testimony prior to [the witness'] examination at trial". Here, the exact opposite obtained. In *Rich*, "the pertinent reports were read to [defense-counsel] by the Assistant United States Attorney in advance of the trial"; whereas, here, the prosecutors used their *pre*-trial time to suppress evidence and suborn perjury. Finally, in *McKenzie*, "the defendants knew of [the disputed] tape * * * before the trial began", "specifically request[ed] this tape from the government prior to the trial", but then "accepted the government's assertion that it did not have possession of the tape and let the matter drop". How these facts parallel the instant case the Court of Appeals did not explain.[67]

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[66] The Court of Appeals did not comprehend that the "notes" of which Rideoutte spoke, and to which its opinion refers, are *different from* the report. Otherwise, it might have divined the flaw in its Jencks-Act analysis: namely, that whereas petitioners' knowledge of the "*notes*" might imply "waiver" of *their* production, such knowledge did not imply equivalent knowledge of the *report*, let alone "waiver" of *its* production.

[67] United States v. Lemus, 542 F.2d 222, 223 (4th Cir. 1976) (emphasis supplied); United States v. Peterson, 524 F.2d 167, 174-75 (4th Cir. 1975) (emphasis supplied); Rich v. United States, 261 F.2d 536, 537 (4th Cir. 1958); United States v. McKenzie, 768 F.2d 602, 606-07 (5th Cir. 1985).

In short, the Court of Appeals' theory of "waiver" is worthless.

III. The Court of Appeals blundered by refusing to allow petitioners to add to their appeal a substantial new issue raising abuse of the Grand Jury, and to require the prosecutors to disclose all Grand-Jury evidence concerning petitioners' alleged "establishment" of the Bullion Fund.

The Court of Appeals' refusal to permit petitioners to supplement the issues on appeal and obtain discovery of Grand-Jury evidence is unexplained.[68] And, too, unjustifiable.

A. The prosecutors' admission that their Bullion-Fund theory "enabled [them] to bring indictment" and the powerful circumstantial evidence that their conspiracy perverted the Grand Jury raise the novel and substantial issue of whether an "indictment * * * procured through the use of perjured testimony before the grand jury" must be dismissed perforce of the Fifth Amendment or this Court's supervisory powers.[69] The practical importance of this question, too, is pressing. For, although the Grand Jury performs the constitutional function "of protecting citizens against unfounded criminal prosecutions and must "operate 'independently of [the] prosecuting attorney' ", it "depends largely on the prosecutor's office to secure * * * evidence" and to "advise [when] not to indict".[70] And misuse of this dependence by designing prosecutors has fueled

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[68] *See* A at 9a.

[69] *Coppedge* v. *United States*, 369 U.S. 438, 453-54 (1962), remains, to petitioners' knowledge, the leading case.

[70] United States v. Sells Engineering, Inc., 463 U.S. 418, 423, 430 (1983).

the belief that "the grand jury * * * is now a tool of the Executive".[71] This case proves the belief not unfounded.

The Grand Jury is not beyond constitutional control.[72] In cases not involving a prosecutorial conspiracy to procure a false indictment, this Court has countenanced indictments resting on improper evidence[73] because such evidence can be excluded at trial; and a conviction after a constitutionally valid trial "represents a break in the chain of events which has preceded it in the criminal process".[74] Here, however, no *constitutionally valid* trial followed the indictment. Petitioners' conviction was not "a break in the chain of events" but a link in the prosecutors' conspiracy. And the error in the "grand jury's charging decision"—permitting a trial on the fraudulent Bullion-Fund theory—"deprived [petitioners] of a fair determination of the issue of guilt" before the Petit Jury.[75] Thus, the constitutional issue could not be more exquisitely framed.

This Court has employed its supervisory powers to remedy violations of constitutional and statutory rights, to preserve judicial integrity, and to deter prosecutorial misconduct.[76] These traditional purposes all apply here. For the conspiratorial actions of Blondin, Conroy, and Rideoutte were in patent violation of petitioners' rights under

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[71] United States v. Dionisio, 410 U.S. 19, 25 (1973) (Douglas, J., dissenting).

[72] *See* United States v. Calandra, 414 U.S. 338, 346 (1974).

[73] *Contrast* Coppedge, 369 U.S. at 453-54, *with* Calandra, 414 U.S. at 344-35; United States v. Blue, 384 U.S. 251, 254-55 (1966); Gelbard v. United States, 408 U.S. 41, 60 (1972).

[74] Tollett v. Henderson, 411 U.S. 258, 267 (1973). *See* United States v. Mechanik, ___U.S. ___, ___, 106 S. Ct. 938, 941-43 (1986).

[75] *Compare and contrast* Mechanik, 106 S. Ct. at 943.

[76] *E.g.*, Elkins v. United States, 364 U.S. 206, 222-23 (1960); McNabb v. United States, 318 U.S. 332, 340-45 (1943); Mesarosh v. United States, 352 U.S. 1 (1956).

the Fifth Amendment, the Jencks Act, and this Court's decisions in *Brady, Napue, Chapman,* and related cases—as well as constituting crimes in and of themselves under section after section of the criminal code. The prosecutors and Rideoutte *designed* their conspiracy in knowing hostility to petitioners' rights, and with full awareness that, to carry it out, they would be required to commit one felonious act after another. The prosecutors and Rideoutte *implemented* their conspiracy in the District Court through cynical manipulation of *Brady* and Jencks-Act procedures, and by lying to the District Court (not to mention petitioners) at *pre*-trial (Conroy) and trial (Blondin) and to the Petit Jury during their case-in-chief (Blondin and Rideoutte) and their summation (Conroy). How they deceived the Grand Jury is readily inferible from the indictment their fraudulent Bullion-Fund theory "enabled [them] to bring". But they can now *profit* from their coldly calculated misdeeds only if this Court countenances Rideoutte's perjury, ratifies their other deliberate wrongdoing, and becomes the accomplice of the lawbreakers and accessory after the fact to their lawlessness, by permitting the indictment and convictions to stand. But, *particularly the indictment*—for obtaining the indictment was the very point of the prosecutors' criminal enterprise in the first place; and it was that enterprise which they themselves boast "enabled [them] to bring [the] indictment".

B. Petitioners' right to review key Grand-Jury evidence on the Bullion Fund that "enabled [the prosecution] to bring [the] indictment" is clear. Disclosure of Grand-Jury materials is proper where the "ends of justice require" it, a "particularized need" exists, and the complainants have made a "preliminary factual showing of serious miscon-

duct".[77] On the present record, this Court cannot possibly assume that no further evidence incriminating the prosecutors will come to light if petitioners scrutinize the Grand-Jury minutes themselves.[78]

CONCLUSION

Edmund Burke admonishes us that "[a]ll that is necessary for the forces of evil to win in the world is for enough good men to do nothing". He who has overcome the world reminds us of what, for want of ten righteous men, befell two cities steeped in iniquity—that we, as Abraham and his children, may do judgment and justice.[79] To date, petitioners have found not *one* good or righteous man in their trial by ordeal in the federal judicial system. Peradventure at least four sit on this Court.

The petition should be granted, and the writ issued.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

Counsel of Record Pro Bono Publico
for Petitioners Linne et alia

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[77] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400-01 (1959); Advisory Committee Notes to Fed. R. Crim. P. 6(e)(3)(c)(ii).

[78] *See* Dennis v. United States, 384 U.S. 855, 873-75 (1966).

[79] John 16:33; Genesis 18:17-33.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5018(L)

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

BURTON D. LINNE
Defendant-Appellant

No. 86-5019

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JACK O. SLATER
Defendant-Appellant

No. 86-5020

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JOHN C. IMLAY, IV
Defendant-Appellant

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[2] No. 86-6782

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

BURTON D. LINNE
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief United States District Judge. (CR-85-223-A).

Argued: June 2, 1987 Decided: August 14, 1987

Before HALL, SPROUSE, and WILKINSON, Circuit Judges.

Edwin Vieira, Jr. for Appellant; Gail A. Brodfuehrer, Tax Division, United States Department of Justice (Roger M. Olsen, Assistant Attorney General; Michael L. Paup; Robert E. Lindsay; Donald W. Searles, Tax Division, Department of Justice; Henry E. Hudson, United States Attorney on brief) for Appellee.

[3] PER CURIAM:

Burton D. Linne, Jack O. Slater, and John C. Imlay, IV, appeal from their convictions on numerous counts of mail fraud, 18 U.S.C. §§ 1341, 2, one count each of conspiracy to defraud the United States, 18 U.S.C. § 371, and with respect to Linne and Slater only, several counts

of willful failure to file income tax returns, 26 U.S.C. § 7203.[1] Their sole contention on appeal is that the government failed to disclose an allegedly exculpatory investigative report written by an agent of the Internal Revenue Service who testified at trial. They argue that the government violated the Jencks Act, 18 U.S.C. § 3500, and deprived them of their due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing the report. We find no merit to either argument and affirm.

At trial the government presented uncontroverted evidence that Linne designed, and with the assistance of Slater and Imlay, promoted and operated an income tax evasion scheme. The scheme involved two programs marketed through the mails by an organization known as the American Liberty Information Service. The programs were called the Administrative Notice and Declaration of Immunity (ANDI) and Citizens for Dollars (CFD). The defendants also promoted a foreign "investment service" known [4] as the Bullion Fund[2] as a mechanism for concealing income from the IRS.

The defendants marketed the ANDI program by representing to prospective customers that a citizen's obligation to pay federal income taxes arises solely from voluntary participation in federal entitlement programs, *e.g.*, Social Security. According to their promotional materials, a taxpaying citizen could become a "non-taxpayer" by excluding himself from all governmental benefits. Sub-

[1] Linne was convicted on one count of conspiracy to defraud the United States, eighteen counts of mail fraud, and five counts of willful failure to file income tax returns. Slater was convicted on one count of conspiracy to defraud the United states, seventeen counts of mail fraud, and two counts of willful failure to file income tax returns. Imlay was convicted on one count of conspiracy to defraud the United States and seventeen counts of mail fraud.

[2] Although subject to some dispute at trial, the Bullion Fund apparently was registered in the Turks and Caicos Islands and licensed to do business in the Bahama Islands.

scribers to the ANDI program could purportedly achieve "legal non-taxpayer" status by filing "notices of recission" with various federal agencies. The notices, which were supplied by the defendants through ANDI, purportedly converted ANDI subscribers into "disenfranchised freemen" and extinguished their obligation to pay taxes. Linne and his co-defendants charged ANDI subscribers between $2,000 and $31,000 for membership in the program. Approximately one hundred persons subscribed to ANDI between 1982 and 1984.

From 1983 on, Linne, Slater, and Imlay marketed the CFD program as a check-cashing clearinghouse for ANDI subscribers. Using a Virginia bank account, the defendants represented that, for a fee, CFD would cash ANDI subscribers' checks without detection by the IRS. They provided CFD customers with a concealment kit that included, among other things, a "non-photo [5] blue pencil" that would prevent the bank from making photographic records of their signatures. The defendants charged a one hundred dollar fee for membership in CFD and added a service charge for every check CFD cashed. The government presented uncontroverted evidence that CFD's bank deposits totaled over five million dollars in an eighteen-month period ending in August 1985 and that the defendants received substantial commissions on these deposits. Unchallenged evidence also established that Linne and Slater earned taxable income during these years and failed to file income tax returns.

Following an IRS search of CFD's offices, which revealed the "secret" account numbers of CFD subscribers and other CFD materials, the defendants promoted the Bullion Fund as a more secret mechanism for concealing income from the IRS. According to the defendant's promotional materials, the principal virtues of the Bullion Fund were the privacy with which it conducted its operations and the benefit of secreting funds in a foreign entity

not subject to United States tax laws, disclosure laws, or IRS discovery procedures.

At trial numerous witnesses testified that they were defrauded by the defendants' schemes. They described in detail the tax evasion programs and the defendants' false representations. The government also introduced many examples of the documentary materials the defendants sent through the mail to promote their programs. Finally, an IRS agent testified that, during his investigation of the Bullion Fund in the Bahamas, he [6] had spoken with two individuals familiar with the Fund, but discovered no corporate existence for it other than a post-office box in Nassau. Although concededly aware that while testifying the agent possessed a report he had prepared on his investigation, the defendants made no request to review it or otherwise discover its contents.

The defendants' sole defense was that they honestly believed their activities were lawful. They maintained that they never intended to defraud customers and that their failure to pay income taxes stemmed from the belief that they were "legal non-taxpayers." The jury returned guilty verdicts on a total of sixty-two counts of the indictment.

In a post-verdict motion construed by the court as a motion for a new trial, Linne asserted that the government violated Rule 16 of the Federal Rules of Criminal Procedure by not disclosing or permitting review of the IRS agent's investigative report prior to trial. In support of the motion, Linne claimed that the IRS agent's testimony did not completely or accurately reflect all of the information he had acquired about the Bullion Fund in his investigation. Linne presented affidavits stating that the Bullion Fund was a registered corporate entity in the Turks and Caicos Islands and that persons other than the defendants had formed and operated the Fund. Linne maintained that the agent's report included these facts and that if he had been able to review it he could have im-

peached the agent's testimony. The district court denied the motion.

[7] On appeal, the defendants contend that the government's nondisclosure of the IRS agent's report violated both the Jencks Act and their due process rights under *Brady*. We disagree.

While it is true that the government promised to disclose all Jencks material before trial, this concession did not obviate the defendant's statutory obligation to request the agent's report at trial. *United States v. Lemus*, 542 F.2d 222, 223 (4th Cir. 1976), *cert. denied*, 430 U.S. 947 (1977); *United States v. Peterson*, 524 F.,2d 167, 175 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *Rich v. United States*, 261 F.2d 536, 537 (4th Cir. 1958), *cert. denied*, 359 U.S. 946 (1959); 18 U.S.C. § 3500. Although aware that the agent was testifying from notes he had prepared, defense counsel failed to make any request to review them and therefore waived any Jencks Act complaint.[3]

The defendants' *Brady* contentions also fail. The report was not material to the question of their intent to defraud or to their willfulness in failing to file federal income tax returns. There can be no *Brady* violation absent a showing of the materiality of the undisclosed evidence. *See United States v. Agurs*, 427 U.S. 97, 112 (1976). Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 105 S. Ct. 3375, [8] 3384 (1985); *see United States v. Alexander*, 789 F.2d 1046, 1049-51 (4th Cir. 1986). The government at trial presented overwhelming evidence,

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[3] Defendants' reliance on *United States v. McKenzie*, 768 F.2d 602, 609 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 861 (1986), on their Jencks Act claim is misplaced. The fact that the defendants were aware at trial of the existence of the agent's report distinguishes this case from that case.

independent of the IRS agent's testimony, from which the jury could find that the defendants knew of the unlawfulness of their activities. The possibly impeaching information contained in the agent's report bore no relationship to this independent evidence. Moreover, the agent's testimony was confined to a matter largely collateral to the charges against the defendants. His testimony was not significant on the question of the defendant's intent and nondisclosure of a report that could do no more than impeach that testimony did not violate the defendants' *Brady* rights.

In view of the above, the defendants' convictions are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

August 14, 1987

TO: Joseph John Aronica, Esq.
Michael Lee Paup, Esq.
Roger Milton Olsen, Esq.
Robert Esten Lindsay, Esq.
Gail A. Brodfuehrer, Esq.
Donald Werner Searles, Esq.
Edwin Viera Jr., Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 86-5018, 86-5019, 86-5020, 86-6782

The Court's opinion is enclosed.

* * * * *

JOHN M. GREACEN
CLERK

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 86-5018(L)
NO. 86-5019
NO. 86-5020
NO. 86-6782

UNITED STATES OF AMERICA,

Appellee,

versus

BURTON D. LINNE, *et al,*

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge.

FILED
JUL 20 1987

Upon consideration of the appellants' motion to add a "supplemental question presented" to this appeal, the appellants' motion to disclose the attachments to IRS agent Rideoutte's report, and all grand jury evidence on appellants' alleged status as principals of the bullion fund, and the appellant Burton D. Linne's motion for release from prison on personal recognizance,

IT IS ORDERED that each motion is denied.

Entered at the direction of Judge Sprouse with the concurrences of Judge Hall and Judge Wilkinson.

For the Court,

/s/ JOHN M. GREACEN
CLERK

Internal Revenue Service
memorandum

date: August 14, 1985 19 PM 1:20
to: Chief, Foreign Programs Division FOD:4

from: Revenue Service Representative—Nassau
FOD:415:JTR

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subject: COLLATERAL REQUEST—CFP # (None given)
RE: BURTON LINNE, ET AL.

COLLATERAL REPLY—FINAL REPORT

An investigation of the Bullion Fund, etc. here in The Bahamas revealed that none of the companies involved (except Continental Insurance Company—explained later) are registered in The Bahamas. The Bullion Management Corp., Ltd. is, however, registered in the Turks & Caicos Islands. None of these companies has a telephone listing in the local directory and a source at the phone company reports they have no record of them. The Post Office Boxes shown as well as the telephone number (322-8549) belong to a local attorney, Anthony Thompson, whose principal operation is International Investment Management, Ltd. The Governor of The Bahamas Central Bank indicated that Thompson's firm had signatory authority over the bank account (0378917) at Canadian Imperial Bank of Commerce.

The Bahamian police advised that Gordon Briggs is not here, at least legally, because he is on the "Restricted List" as a result of the Interpol flyer. Neither the police, the Central Bank, nor anyone I spoke with knew anything about any of the three principals (Burton Linne, Jack O. Slater, Paul Robinson).

Sterling R. L. Quant was contacted but he referred all questions to Anthony Thompson who is his employer and

who, Quant said, handled the Bullion Fund affairs and was more knowledgeable. Thompson reported that he was contacted by Gordon Briggs in late 1983 about forming a company and establishing a bank account to handle a precious metals fund. Briggs was not located in The Bahamas and Thompson was to manage the operation locally under Briggs direction. The Bullion Management Corp. was formed and bank accounts were opened at Canadian Imperial Bank of Commerce and Barclays. However, once operations really started problems developed and Thompson said he tried several times to get Briggs to comply with his request for financial information and invoices or documents for the various amounts Briggs was instructing him to pay. Each time Briggs would promise and assure Thompson that there was no problem.

[2] Finally, Thompson said he could go no further and in addition to his own reservations he had received calls from the bank wanting to know what was going on and wanting assurance that everything was on the up and up. Then Thompson learned that Briggs had been prohibited from coming into The Bahamas; so, he advised Briggs that he was terminating the relationship and did so the last of 1984 or early 1985.

According to Thompson, Quant and all other officers, etc. were merely nominees, the principal was Briggs. He said that if Briggs had any partners, etc. they were unknown to him. The bank accounts are either closed or dormant with little funds in them. All disbursements and actions of any consequence were directed by Briggs, usually from Panama, where Thompson assumes Briggs is still located.

Anthony Thompson is known to do a considerable business in forming corporations, bank accounts, trust companies, invoicing and re-invoicing, etc.—all with few questions asked. What he does mainly is sell Bahamian secrecy and if too many questions start to be asked by the authorities, then Mr. Thompson bows out. Consequently, I believe that

what he reported is basically correct; he merely provided the cover and bank account so the money could then be forwarded back to Briggs or whomever Briggs wanted to receive it.

Continental Insurance Company is a legitimate company and while they would not reveal the names or type coverage they had with anyone, they indicated they don't write the kind of policy the Bullion Fund supposedly has.

None of the people interviewed would be available to testify since to do so would be in violation of the strict Bahamian secrecy laws. In fact, if it were known what they told me they could be prosecuted. Actual bank records, of course, are out of the question.

As requested, we return herewith the original collateral request and other related documents. The IRS personnel having access to this request are: James T. Rideoutte and Dorothy H. Miles.

If there are any questions or we can be of further service, please advise.

/s/ JAMES T. RIDEOUTTE
James T. Rideoutte
RSR—NASSAU

Attachments
As Stated

[224] Whereupon

JAMES RIDEOUT

was called as a witness in behalf of the Government, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLONDIN:

Q Sir, will you please state your name for the record.

A James Thomas Rideout.

Q And where are you employed, sir?

A U.S. Embassy, Nassau, Bahamas.

Q And for the United States Government?

A Yes.

Q And what agency?

A I represent Internal Revenue Service.

Q And what is your title with the Internal Revenue Service?

A My IRS title is Revenue Service Representative.

Q And would you describe the duties of a revenue service representative?

A Basically I represent the Internal Revenue Service throughout that part of the Caribbean, eight-island countries, doing all sorts of investigative or securing information that relates to inquiries we have from the States.

Q And did you have an occasion to do an investigation [225] concerning an entity called the Bullion Fund?

A Yes.

Q When was that, sir?

A I don't remember precisely, but it has been fairly recently, a couple months ago, I would say.

Q And do you remember what you did in connection with that investigation?

A Yes. I basically tried to determine what their presence if any was in the Bahamas, whether they were in business there or not, and that sort of thing.

Q. And what type of agencies or sources of information would you attempt to contact?

MR. PICKARD: Your Honor, may I be heard? I think everything he is going to say is going to be hearsay, if he goes to an agency and finds out something to come back and report that, it becomes hearsay. The act of hearsay. Unless he brought some documents or something or has a live witness, I believe it is hearsay.

THE COURT: Objection overruled.

THE WITNESS: Excuse me?

BY MR. BLONDIN:

Q What contacts or sources did you check in the Bahamas in connection with this investigation?

A Well, I checked with the police, registrar of companies, chamber of commerce, the Governor of the Central [226] Bank of the Bahamas, a couple of attorneys, Bahamian attorneys, the post office, telephone company.

Q You checked with an individual called Sterling Quant? (Phonetic).

A Yes.

Q Any other individuals connected with Sterling Quant?

A Anthony Thompson.

Q Sir, did you find any record, any information, with the Bullion Fund at the registrar of companies?

MR. PICKARD: Again, how can I cross examine those records? I believe it is objectionable. He goes to the police, and if he gets some information from the police, I can't cross examine.

THE COURT: If it is the lack of records that the witness is going to testify to, I think he can testify to that. If he undertakes to say what the record affirmatively shows, I think you are correct. I gather that it is going to be a lack of record—

MR. BLONDIN: Yes, Your Honor.

THE COURT: —that he found.

BY MR. BLONDIN:

Q You said you checked the registrar of companies?

A Right.

Q In the Bahamas?

A Right.

[227] Q Would you briefly describe for us what that entity is?

A Well, to be registered in the Bahamas is the same as being incorporated in the States.

Q And did you find any registration for the Bullion Fund?

A No.

Q How about the Bullion Management Corporation?

A No.

Q Did you check with the chamber of commerce?

A Yes.

Q Did you find any records concerning Bullion Fund?

A No.

Q How about the police files, records?

A. They had never heard of them.

MR. BLONDIN: No further questions, Your Honor.

MR. PICKARD: Could I have one moment, please?

THE COURT: Yes.
(Pause.)

CROSS EXAMINATION

BY MR. PICKARD:

Q Mr. Rideout, would you tell us what post office box you checked, what post office box number you checked when you went looking for the Bullion Fund, if you recall?

A I don't have the number, but it is in my report. I [228] assume they have it.

Q You don't remember off the top of your head?

A I might have it here. I can tell you who it belonged to if that is any help.

Q Well, did you go check for a specific post office box?

A Well, the post office had no post office box for the Bullion Fund, if that is what you are asking.

Q Okay. Did you check any specific post office boxes?

A Yes, I did.

Q Did you check N8669?

A I am not sure whether I have that or not. Let me see.
(Witness checking documents.)
If I did, I don't have a record of it here.

Q Were you told to check specific post office boxes?

A Yes. I was given one.

Q But not N8669?

A Yes—I see Box N8669 here in my notes.

Q Did you check that one?

A I am sure I did.

Q But you do not recall today what you found out?

A I believe I know what I found out, but I can't say—

Q With any certainty?

[229] A —with absolute certainty.

Q Very well. Did you check to find out whether a man by the name of Gordon Briggs was there?

A Yes.

Q Did you find out?

A He was not there.

Q Okay. Had he been there before?

A Yes.

Q On how many occasions?

A I don't know.

Q But at least a man by that name had been to wherever you were looking?

A Right. He is not there now, though.

Q I understand.
What about a Mr. Quant, and a Mr. Taylor, had they ever been there?

A Quant is there now. Yes, he is an attorney. He is a Bahamian attorney.

Q All right. What about Mr. Thompson?

A Mr. Thompson—Quant is associated with Mr. Thompson, or works for Mr. Thompson. He is also an attorney there.

Q They are attorneys. Okay.

A I think that P.O. Box belongs to Thompson, by the way. I am not sure.

[230] MR. PICKARD: Thank you.

MR. BEVERLY: No questions, Your Honor.

MR. NELSON: No questions.

THE COURT: You may step down, sir.

(Witness excused.)

* * *

[97] THE COURT: Anything else? All right, Mr. Blondin, we will hear your closing argument or Mr. Conroy.

MR. CONROY: May it please the Court, ladies and gentlemen, we are at the stage of the proceeding which is known as a summation. The Government is given an opportunity to illustrate and to highlight the evidence that has been admitted into evidence and then after that, the defense is allowed an opportunity to speak to you and then again the Government is allowed an opportunity to come to you again and speak in rebuttal.

The purpose of that order, the Government going first, is that the Government has the burden of proof in this case. The Government must prove the elements beyond a [98] reasonable doubt.

Ladies and gentlemen, you will have with you in the jury room a copy of the indictment. The indictment is merely an accusation. What that indictment alleges in count 1, that Burton D. Linne, Paul Robinson, Jack Slater, John Imlay and Richard Robinson conspired to defraud the United States. The counts 2 through 20 address the mail fraud counts; counts 21 through 25 accuse Mr. Linne of willfully failing to file individual income tax returns for 1980 through 1984.

Counts 26 through 27 accuse Mr. Slater of willful failure to file individual income tax returns for 1980 and 1981.

Now, as a housekeeping detail, I would like to explain the numbering system of the exhibits to you. There is a particular system with respect to how these were numbered. Exhibit No. 1 are the ANDI applications, the members of the Administrative Notice and Declaration of Immunity Program; and it is divided into various stages, the predecessor, the program, the ANDI program, and the evidence indicates that the ANDI program enrolled over 100 members into the program at a cost of anywhere between $2,000 to $30,000 in fees. A certain percentage of those fees went to the sponsors. A percentage of the fees went to the ALIS chapter in Georgia, and a percentage went to Mr. Burton Linne in Arlington, Virginia.

Now, Counts 2 through 20 relate to mail fraud counts. [99] The mail fraud count are 2 through 20, and Exhibit 2 would relate to Count 2. Exhibit 3 to Count 3, and so on. Exhibits 21 through 29 relate to the promotional aspects of the ALIS and ANDI program.

In addition to the promotional aspects, the promotional representations that are contained in those exhibits, we heard the testimony of certain participant in that program. Mr. Mlakar, Mr. Stearns, Mr. Ritcheson.

Exhibit 30 through 39 are the record of the Internal Revenue Service, certified records of accounts. Exhibit 30 demonstrates that Mr. Burton Linne failed to file individual income tax returns for five years, 1980, 1981, '82, '83, and '84.

Exhibit 31 establishes that Mr. Slater failed to file individual tax returns. The balance of the 30 series of exhibits relate to the participants in the programs, the ones that you heard: Mr. Ritcheson, Mr. Mlakar, Mr. Stearns. Those records of the Internal Revenue Service highlight, they demonstrate, the motivation for these individuals to

get involved in the ANDI program. If you review the records, you will see that for the most part these individuals had substantial audit deficiencies just prior to their participation in the program.

Exhibits 40 through 49 are the records of Accountor Systems. You heard the testimony of Mr. Crowley. It was the [100] records of Accountor Systems were received into evidence, the checks, the other financial documents that establish the income of these individuals, Mr. Linne and Mr. Slater.

Exhibits 50 through 152 are the general exhibits. They relate to the conspiracy charge contained in count 1. These documents establish the overt acts and the allegations that are contained in the indictment; as well as the evidence that we have received through the witnesses.

Now, ladies and gentlemen, I will speak for a moment on counts 21 through 27, the willful failure to file individual income tax returns. Now, to establish the crime of willfull failure to file tax returns as His Honor will instruct you at the conclusion of this argument, the Government must establish beyond a reasonable doubt three elements: a duty to file by virtue of receiving gross income in excess of the amount specified in the statute, a failure to file, and that failure to file; thirdly, it must willful. It is undisputed in this case that Mr. Slater and Mr. Linne received gross income. You can see that through the records of Accountor Systems, and they admitted it on the stand. It is undisputed that they did not file tax returns. I submit to you, ladies and gentlemen, the remaining element for you to decide is the willfulness of these individuals in their failure to file.

Now, to establish willfulness, we can't go into the minds of the defendants during the relevant period. Willfulness [101] is established through inferences. The facts and circumstances that surround the years in question.

Ladies and gentlemen, Mr. Linne did not file a tax return for five years. Mr. Slater, the evidence will indicate, did not file a tax return for three years, including the year 1979 for which he is not on trial.

Ladies and gentlemen, I suggest to you that you read through some of this material. You will see the everchanging, the shifting theories of the defendants.

At one point as you will see in the exhibits, they believed that wages were not income. At another point, they questioned the constitutionality of the Internal Revenue Code.

Ladies and gentlemen, there are other inferences that give rise to willfulness; a consistent dealing in cash, not keeping records, the destruction of records. Remember the shredding of the documents of Citizens for Dollars.

Ladies and gentlemen, Mr. Slater used the services of Citizens for Dollars to conceal his income. When he was paid by Accountor Systems, what he would do, deposit the check on a secret account of Citizens for Dollars and Citizens for Dollars would return cash to him.

Mr. Slater was a participant in the Universal Life Church, a home church, ladies and gentlemen, a home church which he testified he really didn't participate to any great extent. However, the evidence will show to you that Mr. Slater [**102**] would deposit his paycheck in his Universal Life Church account and that church account would pay his personal expenses.

Simply, ladies and gentlemen, the defendants didn't have a mistaken or a misunderstanding of their requirement to file. They disagreed with the law, and they chose not to file. Indeed, they were defiant. I suggest, ladies and gentlemen, you review your own mind the testimony of the individuals of Mr. Slater and Mr. Linne. They are self-serving statements merely attempting to deceive and rationalize their willful violation of a known legal duty.

Now, ladies and gentlemen, count 1 of the indictment charges the defendants, Mr. Slater, Mr. Imlay and Mr. Linne with conspiring to impede, impair, obstruct and defeat the lawful Government function of the Internal Revenue Service of the United States.

To establish the crime of conspiracy, the Government must show you beyond a reasonable doubt three elements: first, that two or more people came together in agreement; second, to accomplish some unlawful purpose; and in this case, that unlawful purpose is to defraud the United States of America. And lastly, the third element, the Government must show that at least one of the conspirators committed an overt act in furtherance of that conspiracy for an agreement without an overt act is not improper.

[103] Ladies and gentlemen, I will ask you to read through the indictment and look at the overt acts that are listed in that indictment. I submit to you that the evidence we heard in this case is replete with evidence of overt acts.

Ladies and gentlemen, this is an organizational chart of the American Liberty Information Service. In 1981, Mr. Linne formed the American Liberty Information Service. That service began to develop certain programs. In February of 1983, they developed the Administrative Notice and Declaration of Immunity program. That program had a predecessor. The Free Man Legal Attack Plan Immunity Rights Prosecution, or FLAPIRP, as Mr. Linne described it.

Now as ANDI proceeded and ultimately failed, they developed a new program, Citizens for Dollars. That was in November of '83. ANDI began in February, began to come apart at the seams, Citizens for Dollars was formed in November of '83.

The Bullion Fund, January of 1984, a new step, a more sophisticated step involving offshore moneys and wire transfers.

Ladies and gentlemen, to establish the first element of the crime of conspiracy, the agreement element, it is clear there was a partnership here between Mr. Linne, Mr. Slater, Mr. Robinson and Mr. Imlay.

I direct your attention to Government's Exhibit No. 75. Government's Exhibit No. 75 is an announcement of a new [104] chapter of CFD in Chicago. The first paragraph of Government's Exhibit 75, the three preexisting partners comprised of Burton Linne, Paul Robinson and Jack Slater incorporate a fourth partner. That fourth partner is another individual, another participant in the scheme, a Mr. Paul Stout.

Ladies and gentlemen, the Government has alleged to you that this conspiracy commenced in February of 1983. Exhibit 51 is a letter from Mr. Robinson to Mr. Linne and Mr. Slater saying it was a pleasure to meet with you. That is where the conspiracy began in February of 1983.

Mr. Slater's involvement comes here with Citizens for Dollars. He was the president of Citizens for Dollars. He opened up the bank accounts. You will have the bank records with you, and you will see Mr. Slater's signature opening up accounts throughout the country for Citizens for Dollars.

Mr. Imlay, the proxy president, the nominee, the cash courier.

Mr. Linne testified yesterday that Mr. Imlay was not a policy maker in the American Liberty Information Service.

Ladies and gentlemen, the issue here is not whether he was a policy maker but whether he willfully participated in the scheme and I submit to you that Mr. Imlay willfully participated in the scheme. I will ask you to take a look at Government's Exhibit No. 1, the collection of ANDI applications. Throughout that exhibit on those applications, you will see [105] Mr. Imlay's signature. Received $1,625. Received $500. And his initials.

He was the bookkeeper. He was the runner. He was the go-between. He willfully participated in this scheme.

Now, ladies and gentlemen, the second element of the crime of conspiracy is an agreement to defraud the United States. The evidence here shows that the individuals were involved in a scheme of impeding, impairing and defeating the lawful Government function of the Internal Revenue Service of the Department of Treasury in the ascertainment, the collection, the determination of the income as well as the income tax of not only the defendants but the participants in the ANDI program.

The defendants began the scheme in February of 1983 for the purpose of implementing the program for themselves and the participants. Now here as I described to you the scheme was basically to defraud the United States. That fraud took two forms. In impeding the determination of income for example, through the use of Citizens for Dollars, Mr. Slater cashing his paycheck into a secret account and cash coming back. The purpose of that was to impede the determination of the income tax, the income and the income tax liability.

The second object was to impede the collection of revenue. That, ladies and gentlemen, I submit to you is established through Citizens for Dollars and the Bullion Fund, [**106**] moving money off shore, getting it out of the country, getting it away from the jurisdiction of the United States Government.

In execution of the scheme, they developed this program. The program, the Administrative Notice and Declaration of Immunity program.

Mr. Mlakar, I believe, testified he paid $2,000 for his packet. Mr. Mlakar's ANDI packet is Exhibit No. 67.

Ladies and gentlemen, I will ask you to take a look at the packet as an example of what they were selling. They were selling xerox copies of affidavits, of recision forms,

instructions; very little original material in the various packets. It's just a xerox copy of the next packet.

Ladies and gentlemen, what they were involved in was a paper war to flood the Internal Revenue Service with paper. Say you are not a taxpayer. Ladies and gentlemen, all of these documents, all of these filings can be summed up in one exhibit, Exhibit 122. Mr. Salter sent a letter to the Internal Revenue Service stating, "I am not a taxpayer." That's it. All of this paper, all of these exhibits are summed up in that theory.

Mr. Linne took the stand yesterday and stated to you if you are a nontaxpayer, you don't pay taxes and if you don't pay taxes, you are a nontaxpayer. This is the circular reasoning that they were selling. The sad fact is people were buying it.

[107] Now you will notice through the evidence and through the testimony there was a progression to this scheme. The first one prior to the start of the conspiracy that is addressed in this indictment was the FLAPIRP program.

The next one was the ANDI program. Constantly changing, constantly evolving. Bill Foley testified that he was convicted and as a result of his conviction, the ANDI program changed. But the representations kept going out. The representations that you could become a nontaxpayer. Now, I think it's clear through what we have seen that there was no such thing as a nontaxpayer. Mr. Linne assisted an individual by the name of Paul Drefke (phonetic) in June of 1983. Mr. Linne wrote his briefs, the trial, and after his conviction, wrote his appellate brief. The Court ruled that there was no such thing as a nontaxpayer. That opinion was in June of 1983. Mr. Linne continued to represent and to sell the program. Why? Because it was making money. Take a look at Government's Exhibit No. 79. Those are the payment ledgers, the money coming into the American Liberty Information Service.

Mr. Linne testified yesterday that eventually he realized that the ANDI program was coming apart. The next step, Citizens for Dollars, now what is the Citizens for Dollars? It is merely a private banking system. Private is another word for secret. Secret from who? The Internal Revenue Service, the United States Government.

[108] Once again to illustrate simply what Citizens for Dollars did, it would take an individual's paycheck and return cash to him, or in the alternative, it would pay his expenses. It was advertised through representations made concerning Citizens for Dollars.

Citizens for Dollars. Reduce your payroll taxes to one-tenth of what they are. That is the silver. That is the philosophy about a silver dollar and a one dollar bill. This is a morally and legally sound tax avoidance based on pure law No wild theories. Financial privacy far superior in every respect to the best Swiss secret bank accounts and other benefits.

What was the purpose for Citizens for Dollars? Twofold. To conceal the financial activities of the participants in the ANDI program for the purpose of hiding income. Did they derive any benefit from this program? Sure. Any time a person wanted a check chased, they received the benefit of one-and-half percent of that check. Any further benefit? Yes. Corporate clients. A corporate client paid four-and-a-half percent of the check and who was their big corporate client? Arby's Roast Beef, a Midwest holding company of eight Arby's Roast Beef franchises, KSV Incorporated.

Ladies and gentlemen, again the question what is CFD? CFD is nothing more than a money laundering operation. Secret accounts, telephone scramblers, shredding of documents. [109] Betty Imlay testified they shredded documents every 15 days. Again the purpose, secrecy, privacy.

Ladies and gentlemen, every laundry needs a washing machine. Government's Exhibit No. 50, a startup kit, is

the washing machine. Your own special stamp bearing your secret account number, your ink pad, your envelopes, your deposit tickets, your authorizations that went to Mr. Linne, and Mr. Imlay. Every member got a washing machine.

Now, Mr. Linne and Mr. Slater would have you believe that they spent a great deal of time in the law library researching statutes, Court cases. We heard from a number of legal law librarians.

What they didn't tell you about, though, is the CFD operation, what it really accomplished.

Citizens for Dollars accomplished this. Members would send their checks in. We heard testimony from the revenue agent testifying that $5.7 million in money went into the Citizens for Dollars account located at the end page of the Manassas and at the bank account in De Kalk, Georgia.

CFD led by Mr. Slater and Mr. Linne, would take their cut and currency, at the option of the members, currency would go directly to the members or they would pay the members' bills for them. Or lastly deposits to the Bullion Fund, money offshore. Again, the secrecy, the hiding, the privacy.

What did they really believe about Citizens for [110] Dollars? I will ask you to look at Government's Exhibit No. 77.

This is a memorandum entitled 11 May, 1984, meeting, Paul R., Burton L., Jack S. confidential. Eyes only.

Turning to page 6, they knew they could accomplish their goals of defrauding the United States. Why did they know? Because it says in the memo here, individuals continue to enjoy the facade of the First Amendment and Fourth Amendment shield.

That's what they were relying on.

Now, in June of 1984, with the Court's permission, the Court order, agents of the Internal Revenue Service ex-

ecuted a search warrant in the offices of the Administrative Notice and Declaration of Immunity program. And in the next room, Citizens for Dollars.

What happened there? Mr. Slater sent out a letter to all members. Exhibit No. 13.

Immediately after the execution of the search warrant, Mr. Slater sent out this letter. Due to the recent visit to CFD by IRS raiders, your account number privacy has been compromised. CFD has issued new account numbers to preserve your privacy.

Again, ask yourselves why? Why did they need this privacy? Did it end? No, it didn't. Mr. Linne, Mr. Slater realized that they had been compromised, that something else [111] was needed. What did they do? They moved offshore. Mr. Linne advertised, represented, stated, a step for greater sophistication, a representation that is contained in Government's Exhibit No. 8, advertising the Bullion Fund. He sent to Fred Ritcheson, Government Exhibit No. 8. Remember Exhibit 8 is count 8 of the indictment. What did Mr. Linne state? So with all that in mind, we can take you by the hand, off the shores of our great land to a tiny island not far from Florida where a tiny company will purchase whatever paper you want but in its name and remit the returns to you under the conditions that are 101 percent legal and absolutely untaxable. As a member of CFD, all of your moves will be total, absolute privacy. CFD takes no part. It maintains total uninvolvement in financial affairs. Thus keeps intact its claim to protection under the First Amendment. You will move on to schedule the quick liquidation of all your paper investments.

Let me take a moment and explain to you exactly how the Bullion Fund transaction occurred. A Bullion Fund wire transfer would commence this way: an individual's account number, private account number with CFD. Mr. Linne would purchase a check from that account number

with the proceeds from the account. For example, on this date, for Mr. Robinson and Mr. Franklin. He purchased a check for $93,205. You will remember Revenue Agent McCarthy on the stand explaining that transaction in his summary.

[112] The next step in the transfer would be for Mr. Linne to purchase a cashier's check and take that cashier's check and wire transfer the money, transfer the money to where? To Corinth Bank, merely a conduit, Sovran Bank in Richmond, Virginia and to the Navy Imperial Bank of Commerce, and finally the Canadian Imperial Bank of Commerce, Nassau, Bahamas, to the Bullion Management Corporation Limited.

The activity of the Bullion Fund was to move money from the CFD account in Virginia and the CFD account in Georgia to the Bahamas. During this period, they moved $900,000 down to the Bahamas to the Bullion Fund.

This exhibit shows you the path, shows you the machinations they went through to move money off shore for the purpose of secrecy. Once again, concealing assets and income of the participants of the ANDI program and—excuse me—of the CFD program.

Ladies and gentlemen, the evidence that you have before you consists for the most part of financial records, bank records, accounting records, ledgers. What you need to do is go into the mind of the defendants in this case. I will ask you to go through Exhibit 120.

120 is a handwritten notice by Burton Linne. It indicates the purpose and the scope of the Bullion Fund. Mr. Linne set his thoughts down on paper and set up his own chart of exactly how the Bullion Fund should work. CFD one [113] day through the Corinth Bank down to Nassau, Bahamas, and then a wire transfer back to the participants in the Bullion Fund. The thoughts he had at the time, gold or paper, off shore banking, administration of tax

shelters, all of this, all of this, for the purpose once again we get back to count I, for concealing the assets and the income of the participants in Citizens for Dollars.

Ladies and gentlemen, what was the Bullion Fund? We heard revenue representative Rideout testify that he went to the registry of companies and found no Bullion Fund, found no records. What did he find? He found a mail drop. A mail drop just like the one on K Street in the District of Columbia. Just like the one that Paul Robinson subscribed to in Canada.

Now, with respect to the mail fraud counts, the mail fraud counts involved the same scheme, only instead of defrauding the United States of America, now we are defrauding the investors, the participants in the program. The elements of the crime of mail fraud are two: a scheme or artifice to defraud, and second of all, the use of mails in furtherance of that conspiracy.

The evidence must show an intent to defraud. Ladies and gentlemen, I submit to you the evidence in this case clearly establishes that intent.

Mr. Linne demonstrates that intent through his [114] promotion of the Bullion Fund, Government Exhibit 114, a letter to Fred Ritcheson extolling the virtues of the Bullion Fund, a 30 percent return on investment. Why off shore? Just another scheme. And why the Bullion Fund?

Mr. Stearns answered that question. Mr. Stearns testified he went to Los Angeles for a meeting with Burton Linne, and when they discussed the Bullion Fund, Mr. Stearns testified before you under oath that Burton Linne told him the Bullion Fund takes care of me.

Now, ladies and gentlemen, as I told you, there is an extensive amount of financial information that is coming to you. I ask you to take the time and look at Government's Exhibit No. 78. No. 78 is a simple document. It is a document from the Independent Bank of Manassas.

It is a wire transfer of Citizens for Dollars in the amount of $19,992.25. The Government submits to you that this is how the Bullion Fund took care of Mr. Linne. The Government submits to you that Mr. Linne received this $20,000 less some handling charges, and this is corroborated through Government Exhibit 145.

Remember, Mr. Linne testified yesterday that $20,000 wire transfer was ALIS money. Government Exhibit 145 shows that to be wrong.

There were only two wire transfers prior to this, prior to this $20,000 being received back from the Bullion [115] Fund. There was no other money being sent over except for two wire transfers, one for the benefit of Paul Robinson, and one for the benefit of another ANDI member, Mr. Franklin.

Mr. Linne denies meeting Mr. Briggs. He couldn't remember. Ladies and gentlemen, his calendar didn't forget. His telephone toll record didn't forget.

Ladies and gentlemen, when you address the mail fraud counts, as I said, coordinate the exhibit with the account. For example, Government Exhibit No. 3, the affidavit of success, Mr. Linne took the stand and qualified his affidavit of success. He didn't qualify it when he sent it out through the mails.

Government Exhibit No. 22-A, Mr. Linne denied knowing such money was being made through the ANDI program.

Take a look at Government's Exhibit 22-A. It shows you the profit motive. Mr. Linne's own writing, suggested patriot price, $13,000, sponsor pays, ALIS Atlanta, $6,500. ALIS Atlanta pays Washington, Burton Linne, $3,250. Mr. Linne had this all planned out. He knew just what the price was going to be and how much he was going to get from it.

I will ask you to take the time to go through Government's Exhibit No. 22 and look at Mr. Linne's notations in determining the prices.

The motive can all be summarized in Government Exhibit 79. That is simply the payment ledgers. They kept [116] track very carefully of the amounts that came in, when it came in, to whose account.

Mr. Kundig asked for his money back. Mr. Linne wrote back, there can be no accounting of the sums that you forwarded to us.

Take a look at the payment ledgers. Look how carefully the dates, the amounts, the sources were recorded.

Now, ladies and gentlemen, perhaps the best way to illustrate the fraud that was perpetrated on these investors is through the tape that we heard, the telephone conversation between Mr. Stearns and Mr. Linne.

Mr. Linne testified on the stand yesterday that he doesn't recall the principals of the Bullion Fund. He doesn't know much about it.

Reading from a transcript of the tape, Mr. Stearns asked Mr. Linne who was involved with the Bullion Fund?

Mr. Linne stated, I have looked into it myself and I can tell you I know enough about the people and the way they operate.

Mr. Stearns asked, well who are the principals?

Well, it isn't important that you know who the principals are except they are advised by one individual that I have a lot of confidence in, and he wrote the book Bullion.

Further down in the conversation, Mr. Stearns said, well, how do I get in touch?

[117] And Mr. Linne stated, I have had the opportunity to meet him over a period of time. I know this man now

pretty well. I know he would not be associated with anything that was on the—blank—unintelligible.

Mr. Linne further stated, it is all quite legal, but it has got to be done quietly, privately, or you will attract attention.

Mr. Linne didn't know the principals. He told you that. Mr. Rideout couldn't find the principals. I submit to you the Bullion Fund was nothing but a coverup to conceal the money and the assets of the participants of Citizens for Dollars, all the while taking care of Mr. Linne.

Now, ladies and gentlemen, let's turn for a moment to the defendants' witnesses: Mr. Perrett, Mr. Hawryluk, and Mr. Engle. Mr. Perrett and Mr. Hawryluk took the stand and said they weren't defrauded. Well, of course they weren't defrauded. Those are the people that go to count I, the conspiracy to defraud the United States. They told you they haven't filed tax returns. They haven't filed—excuse me—they haven't paid their income taxes, and that is just what the ANDI program was all about.

Mr. Engle is just the type of person that this program, Mr. Linne, preyed upon in the mail fraud counts. Mr. Engle, a self-described sucker. He was taken in. It highlights the scheme. What did Mr. Engle tell you? I got [118] nothing.

Mr. Hawryluk—Mr. Hawryluk had the nerve to tell you what a patriot he is, but he does not have the nerve to pay the price for the free society that we enjoy.

Ladies and gentlemen, there is a common denominator here. That is money. The making of money. The concealing of money.

I submit to you, ladies and gentlemen, this program of Mr. Linne, Mr. Slater, and Mr. Imlay was nothing more than a charade, and that is illustrated by Betty Imlay. Betty Imlay told you that she got paid in silver coins. She

would be sitting across the table from Mr. Linne. Mr. Linne would push the coins to her. She would push the coins back and take in Federal Reserve notes, which Mrs. Imlay told you is not money.

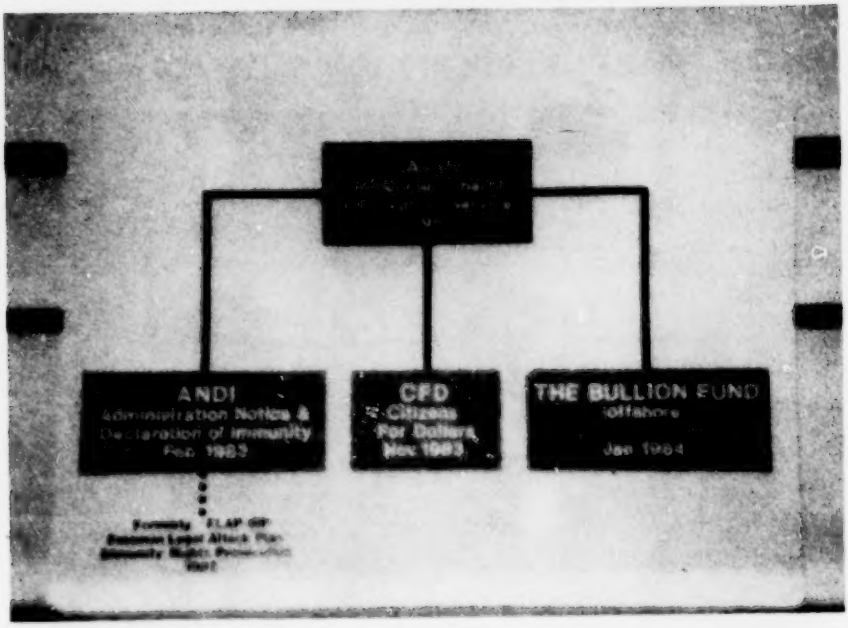
Ladies and gentlemen, I told you this program was nothing more than a program making money. Mr. Linne took the stand yesterday and what did he say to Paul Robinson on the 18th of February, 1984? There is probably no better performer, witness available in the country to give testimony to a jury on these subjects than me.

What did Mr. Linne do in furtherance of marketing this program? He wanted to go on television. He signed up with a public relations woman, a woman by the name of Judith Crispen. Signed this agreement. Miss Crispen was to use her [119] best efforts in getting Mr. Linne on television and radio. He had these glossies printed up.

Ladies and gentlemen, this is a charade. This is a fraud. I ask you to expose it for what it is, expose it for the fraud that it is. I ask you to return a verdict of guilty against Mr. Linne, Mr. Slater, and Mr. Imlay for conspiring to defraud the United States. I ask you to return a verdict of guilty against Mr. Linne, Mr. Slater, and Mr. Imlay for defrauding the investors of this program, counts II through 20 and I ask you to return a verdict of guilty against Mr. Linne for failing to file tax returns, and Mr. Slater for failing to file tax returns.

Thank you.

* * * *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THE BULLION FUND
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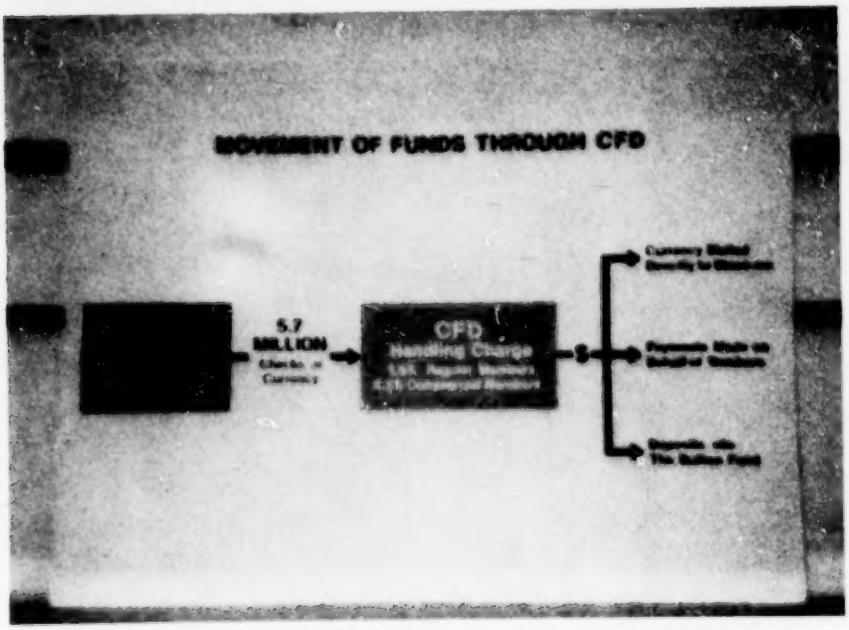
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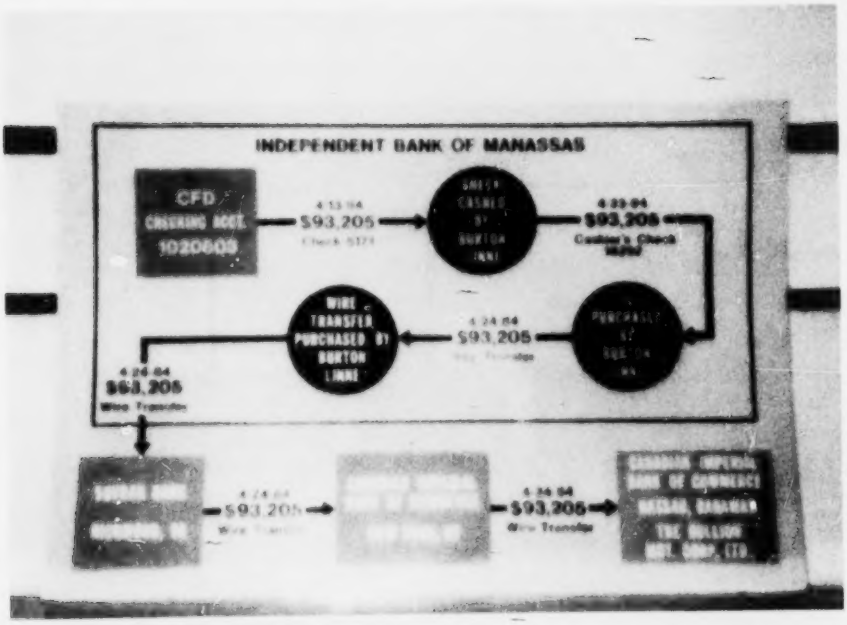
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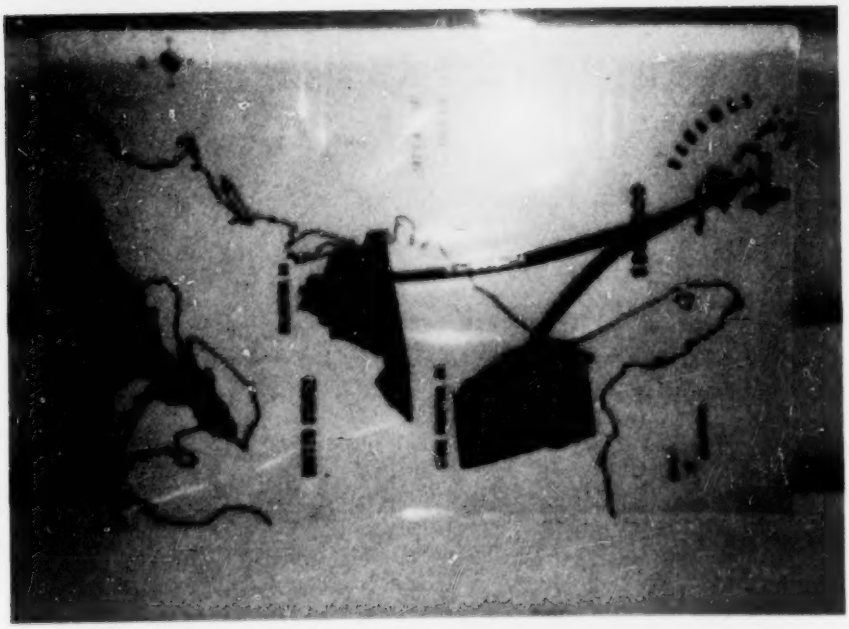

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a * * * infamous crime, unless on a * * * indictment of a Grand Jury, * * *; nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

JENCKS ACT, TITLE 18, UNITED STATES CODE

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of

such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(2)

No. 87-585

In the Supreme Court of the United States

OCTOBER TERM, 1987

BURTON D. LINNE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the "materiality" standard set forth in *United States* v. *Bagley*, 473 U.S. 667 (1985), was properly applied in this case to the alleged nondisclosure by the prosecution of a government investigator's report.

2. Whether, in the absence of a request by defense counsel at trial, the alleged failure of the prosecution in this case to produce a government investigator's report violated the Jencks Act, 18 U.S.C. 3500.

3. Whether the court of appeals erred in declining to consider an additional issue raised after oral argument.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-585

BURTON D. LINNE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 826 F.2d 1061 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1987. The petition for a writ of certiorari was filed on October 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and on numerous counts of mail fraud, in violation of 18 U.S.C. 1341 (Pet. App. 2a-3a). Petitioners Linne and Slater were also con-

victed on several counts of failing to file tax returns, in violation of 26 U.S.C. 7203 (Pet. App. 2a-3a). Petitioner Linne was sentenced to a total of six years' imprisonment and three years' probation; petitioner Imlay was sentenced to a total of six months' imprisonment and three years' probation; and petitioner Slater was sentenced to a total of 18 months' imprisonment and three years' probation (C.A. App. 267-269). The court of appeals affirmed (Pet. App. 1a-7a).

1. Petitioners' convictions and sentences arose out of various income tax evasion schemes that petitioner Linne designed and, with the assistance of petitioners Slater and Imlay, promoted and operated through the mails between 1982 and 1985 (Pet. App. 3a). One scheme, called the Administrative Notice and Declaration of Immunity (ANDI) program, advised prospective customers that a citizen's obligation to pay federal income taxes arises solely from voluntary participation in federal entitlement programs (*e.g.*, Social Security) and that, by filing with the government certain " 'notices of rescission' " provided by petitioners and then not availing oneself of government benefits, a tax-paying citizen may become a "disenfranchised freem[a]n' " who is no longer obligated to pay taxes (*id.* at 3a-4a). Approximately 100 persons, who paid between $2,000 and $31,000 each to petitioners, were induced to participate in the ANDI program during the pertinent period (*id.* at 4a). Another scheme, called Citizens for Dollars (CFD), was a check-cashing clearinghouse through which ANDI program subscribers could avoid using a commercial bank and the attendant obligation of having to pay federal income taxes (*ibid.*); during the 18-month period ending in August 1985, petitioners received more than $6.6 million in deposits under the CFD program, which generated service charges of more than $975,000 for petitioners (*ibid.*; C.A. App. 189, 194). Finally, petitioners promoted a foreign "investment serv-

ice," called the Bullion Fund, through which income could be concealed from the Internal Revenue Service. According to petitioners' promotional materials, persons could invest in this Bahamian entity without being subject to United States tax laws, disclosure laws, or IRS discovery procedures (Pet. App. 3a-5a).

At trial, a number of witnesses described petitioners' schemes and testified that they had been defrauded by those schemes (Pet. App. 5a). The government also introduced many examples of the documentary materials that petitioners had sent through the mails to promote their programs, as well as evidence that petitioners Linne and Slater had not filed tax returns in years in which their gross income had exceeded the amount for which filings are required (*id.* at 4a-5a). In support of the allegation that the Bullion Fund was part of petitioners' fraudulent scheme, the government called as a witness IRS agent James Rideoutte. He testified that he had investigated the existence of the Bullion Fund in the Bahamas and had discovered no evidence that the Bullion Fund was registered (*i.e.*, incorporated) in the Bahamas (*id.* at 13a-16a). Agent Rideoutte had his investigative report in his possession during his testimony and, in fact, he occasionally referred to it. Petitioners, however, made no request for its production at trial. Pet. App. 5a.

In their defense, petitioners claimed that they believed their activities were lawful, that they never intended to defraud their customers, and that their failure to pay income taxes was the result of their good faith belief that they were "legal nontaxpayers" (Pet. App. 5a).

2. Approximately nine months after the verdict, petitioner Linne filed a motion for a new trial. In the motion, he asserted that the government had violated Rule 16 of the Federal Rules of Criminal Procedure by not disclosing or permitting review of Agent Rideoutte's investigative report prior to trial (Pet. App. 5a). In support of the mo-

tion, petitioner Linne claimed that Agent Rideoutte's testimony did not completely or accurately reflect all of the information Rideoutte had acquired about the Bullion Fund during his investigation (*ibid.*). Petitioner Linne presented affidavits of two of his acquaintances, which stated that a Bahamian lawyer, Anthony Thompson, had told them that he and two other persons, Gordon Briggs and Sterling Quant, had created the Bullion Fund and had registered it in the Turks and Caicos Islands. *Ibid.*; C.A. App. 286-291. Petitioner Linne maintained that Agent Rideoutte's report included these facts and that, if defense counsel had been able to review it, he could have impeached the agent's testimony (Pet. App. 5a-6a). The district court denied the motion (C.A. App. 311-312).

3. The court of appeals affirmed (Pet. App. 1a-7a). In response to petitioners' contention that the government had violated the Jencks Act, 18 U.S.C. 3500, by failing to provide them with a copy of Agent Rideoutte's investigative report, the court held that, "[w]hile it is true that the government promised to disclose all Jencks material before trial, this concession did not obviate the [petitioners'] statutory obligation to request the agent's report at trial." The court noted that, although they were "aware that the agent was testifying from notes he had prepared, defense counsel failed to make any request to review them and therefore waived any Jencks Act complaint." Pet. App. 6a.[1] The court similarly rejected petitioners' argument that their due process rights under

[1] The government has consistently maintained throughout these proceedings that a copy of Agent Rideoutte's report was provided to petitioners prior to trial. Neither the district court nor the court of appeals made a finding on that issue. On May 21, 1987, petitioners filed a motion for disclosure of the report prior to oral argument, which was scheduled for June 2, 1987. The government did not object to petitioners' motion and provided the report to petitioners' appellate counsel immediately prior to oral argument.

Brady v. *Maryland*, 373 U.S. 83 (1963), had been violated. The court explained that "[t]here can be no *Brady* violation absent a showing of the materiality of the undisclosed evidence" (Pet. App. 6a), that "[w]ithheld evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different' " (*ibid.*, quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)), and that "[t]he government at trial presented overwhelming evidence, independent of the IRS agent's testimony, from which the jury could find that the defendants knew of the unlawfulness of their activities" (Pet. App. 6a-7a).

ARGUMENT

1. Petitioners rest their legal arguments on two factual premises: (1) that Agent Rideoutte perjured himself at trial; and (2) that the prosecutors knowingly allowed him to do so. Petitioners, however, have failed even to show that Agent Rideoutte's testimony was false, much less that it was intentionally false, or that the prosecutors knowingly elicited perjured testimony. Their principal legal argument (Pet. 4-16) is therefore without force, because it is based on factual assertions that the record does not support.

In attempting to establish that Agent Rideoutte's testimony was false, petitioners rely primarily on the alleged inconsistencies between Rideoutte's testimony at trial and the report of his investigation of the Bullion Fund in the Bahamas. In fact, in spite of petitioners' vehement insistence to the contrary, the two are not inconsistent at all. In his testimony, Agent Rideoutte stated that he had checked with the registrar of companies to determine whether the Bullion Fund was "registered" in the Bahamas, which he explained was the same thing as being incorporated in the United States. He found that neither the Bullion Fund nor the Bullion Management Corpora-

tion was registered in the Bahamas. He added that the chamber of commerce in the Bahamas had no record of the Bullion Fund, nor did the police department. Finally, he stated that he found no record of the Bullion Fund with the telephone company or the post office. Pet. App. 14a-16a.

Nothing in Agent Rideoutte's testimony conflicts with anything in his investigative report. In his report, Agent Rideoutte stated that the Bullion Fund was not registered in the Bahamas, although he noted that the Bullion Management Corp. was registered in the Turks and Caicos Islands (Pet. App. 10a).[2] The report stated, as Agent Rideoutte had testified, that the telephone company and the post office showed no record of the existence of the Bullion Fund. The report further reflects that Agent Rideoutte interviewed the two attorneys that Agent Rideoutte mentioned in his testimony—Sterling Quant and Anthony Thompson—and that Thompson provided Agent Rideoutte with information about the Bullion Fund. According to the report, Thompson said that he formed the Bullion Management Corp. at the request of Gordon Briggs in 1983, and he agreed "to manage the operation locally under Briggs' direction." Pet. App. 11a. Thompson said that he terminated his relationship with Briggs when Briggs failed to comply with Thompson's request for financial information and when Thompson learned that Briggs was prohibited from coming into the Bahamas. Based on his interview with Thompson, Agent Rideoutte concluded in his report that Thompson had "merely provided the cover and bank account so the money [sent to the Bullion Fund in the Bahamas] could then be forwarded back to Briggs or whomever Briggs wanted to receive it." Pet. App. 12a.

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[2] The Turks and Caicos Islands is a tiny British colony located southeast of the Bahamas.

Agent Rideoutte's findings, as summarized in his report, are entirely consistent with his trial testimony. In both, he reported learning nothing about the Bullion Fund from sources such as police files, the chamber of commerce, the telephone company, and the post office. And in both he noted that the Bullion Fund was not registered (*i.e.*, incorporated) in the Bahamas. To be sure, Agent Rideoutte did not discuss in his testimony the contents of his interview with attorney Thompson, but he was not asked to relate Thompson's statements to the jury, because Rideoutte's account of Thompson's statements would have been hearsay. Since defense counsel had objected to Agent Rideoutte's testimony on hearsay grounds, and since the court responded to the objection by permitting Agent Rideoutte's testimony only to the extent that it reflected that he did not find records of the Bullion Fund, petitioners are hardly in a position to complain that Agent Rideoutte did not discuss the contents of his interview with attorney Thompson. And if Agent Rideoutte had related what Thompson had told him, it would hardly have helped petitioners, since the substance of Thompson's experience with the Bullion Fund led Thompson to conclude that the Fund was a questionable entity run by someone who was not even allowed to enter the Bahamas. In fact, Thompson's conclusion—that Briggs was using Thompson and his post office box as a conduit for funds going to Briggs or those designated by him to receive the funds—was consistent with the government's theory that the Bullion Fund was not a legitimate investment company, but merely a conduit for funds generated in petitioners' scheme. Certainly Thompson's account of the Bullion Fund's activities and his cessation of representation of the Fund would have done nothing to buttress petitioners' defense of good faith.[3]

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[3] For example, petitioners were still promoting the Bullion Fund as a Bahamian entity as late as March 1985, months after Thompson said

The affidavits that petitioners produced in their motion for a new trial also failed to show that Agent Rideoutte's testimony was false. The affidavits stated that Anthony Thompson represented that he had participated in creating the Bullion Management Corporation and had registered it in the Turks and Caicos Islands (C.A. App. 286-291). One of the affidavits also stated, ambiguously, that the Bullion Fund had been registered "in Nassau" (C.A. App. 290). Petitioners rely on that statement to suggest that the Fund was registered in the Bahamas as well as in the Grand Turks and Caicos Islands. However, while the affidavit included information regarding the registration of the Bullion Management Corp., Ltd. in the Turks and Caicos Islands (C.A. App. 291), it contained no similar information suggesting that that company or the Bullion Fund was registered the Bahamas. Moreover, the affidavits relate that Thompson and Quant were unable to persuade Briggs to comply with Bahamian registration requirements (C.A. App. 289-290); that, as a result, Thompson and Quant discontinued their association with Briggs and the Bullion Fund at the end of 1984 (*ibid.*); that Thompson subsequently turned over all of the books and records of the Bullion Fund to "Caicos Worldwide Management Ltd.," which is located in the Turks and Caicos Islands (*ibid.*); and that Thompson discontinued his association with Briggs because "somebody was forging Sterling Quant's name to the Bullion Fund receipts which was another reason that he knew something was wrong" (C.A. App. 287). Thus, the affidavits do not in any way rebut Agent Rideoutte's statement that he found

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he had ceased representing the Fund. See C.A. App. 140, 341, 587; GXs 14, 114.

no records indicating that the Bullion Fund was registered in the Bahamas (see Pet. App. 15a).[4]

Because Agent Rideoutte did not perjure himself, there is no merit to petitioners' contention (Pet. 18-24) that the court of appeals erred in applying the "materiality" standard set forth in *United States* v. *Bagley*, 473 U.S. 667 (1985), to the alleged failure to disclose Agent Rideoutte's report. Concomitantly, petitioners are wrong in suggesting that the court of appeals should have invoked the "materiality" standard that has been applied in cases in which the government has made knowing use of perjured testimony. See *United States* v. *Bagley*, 473 U.S. at 678-679 & nn. 8 & 9.

In any event, petitioners have vastly overstated the importance of Agent Rideoutte's testimony; even if his testimony had been false or inconsistent with the contents of his report, the matter would not have been sufficiently significant to warrant a new trial. First, the question whether the Bullion Fund was registered in the Bahamas was not of great importance; what was important was that the petitioners promoted the Bullion Fund as a legal means of avoiding federal tax liability and tax investigations, when in fact the Bullion Fund was simply a means of generating large amounts of cash for petitioners from their victims.[5]

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[4] Even the affidavit of petitioners' current counsel states that the Bullion Fund was registered in the Turks and Caicos Islands; that affidavit suggests that the company was not "registered" in the Bahamas, but was merely licensed to do business there. C.A. App. 605-606.

[5] Although petitioners have featured Agent Rideoutte's testimony as if it were the linchpin of the government's case, in fact Agent Rideoutte was a minor witness whose direct examination occupies less than four pages of the transcript. Petitioners find great significance in a letter from the government to an official in Bermuda thanking him for his cooperation in the investigation of the Bullion Fund. In that letter, the government stated that the official's cooperation made the indictment possible. Petitioners quote that letter no fewer than eight times in the petition (Pet. 7, 19, 20, 27, 29). But while the Bullion

Moreover, Agent Rideoutte did not suggest in his testimony that petitioners had created or participated in the creation of the Bullion Fund, nor was it the government's theory that petitioners had played a role in setting up the arrangement by which the Bullion Fund received "investments" through an address in the Bahamas. Rather, the government's evidence—including petitioner Linne's admissions—showed that petitioners had promoted the Bullion Fund to their victims, and it further showed that the Bullion Fund was not a legitimate investment company and that petitioners caused the Bullion Fund to be used as a means of concealing income offshore.[6] For that reason, the fact that no one Agent Rideoutte spoke with in the Bahamas knew anything about petitioners Linne or Slater—a fact that was reflected in Agent Rideoutte's report—was not exculpatory or in any way inconsistent with either Agent Rideoutte's testimony or the rest of the government's proof.

Finally, the government did not rest its case exclusively on evidence concerning petitioners' use and promotion of the Bullion Fund; rather, the government showed that the Bullion Fund was only one of several methods that petitioners used in seeking to achieve the object of their con-

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Fund was obviously an important feature of the case, the significance of the Bullion Fund in the prosecution did not turn on the relatively minor matter of the status of the Bullion Fund in the Bahamas between 1983 and 1985, which was the only issue addressed by Agent Rideoutte's testimony.

[6] Petitioner Linne admitted at trial that he had associated with Briggs, that he had advised members of CFD to use the Bullion Fund, and that he had caused CFD members' funds to be sent to the Fund account in the Bahamas (C.A. App. 198-200, 214-216, 222). In addition, the government introduced various exhibits and the testimony of a former member of CFD to establish that petitioners had promoted and used the Fund as a means of concealing income from the IRS (C.A. App. 139-140, 328; GXs 8, 120).

spiracy. Thus, the court below correctly concluded that the "government at trial presented overwhelming evidence, independent of the IRS agent's testimony, from which the jury could find that the defendants knew of the unlawfulness of their activities"[7] and, accordingly, there was no *Brady* violation (Pet. App. 6a-7a).

2. Petitioners similarly err in suggesting (Pet. 24-27) that they did not waive their rights under the Jencks Act. As noted above, there is no support in the record for petitioners' claim that Rideoutte perjured himself. Thus, petitioners are wrong in asserting (Pet. 24) that their waiver was somehow "fraudulently induced." Moreover, as the court of appeals explained (Pet. App. 6a (footnote omitted)), "[a]lthough aware that the agent was testifying from notes he had prepared, defense counsel failed to make any request to review them and therefore waived any Jencks Act complaint." See *United States* v. *Peterson*, 524 F.2d 167, 175 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); *United States* v. *Simmons*, 281 F.2d 354, 358 (2d Cir. 1959); *United States* v. *Tellier*, 255 F.2d 441, 449 (2d

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[7] The government showed, for example, that in 1983 petitioner Linne had assisted in the writing of an appellate brief in which he advanced his "legal non-taxpayer" theory; the Court of Appeals for the Eighth Circuit found that theory to be "totally without arguable merit" (*United States* v. *Drefke*, 707 F.2d 978, 981, cert. denied, 464 U.S. 942 (1983); C.A. App. 204-205). To rebut petitioners' claims of good faith, the government showed that petitioners instructed purchasers to "judgment proof" themselves (C.A. App. 211-212, 228, 591; GXs 118-120); that petitioners offered their assistance in the event that any civil or criminal proceedings were brought against ANDI purchasers (C.A. App. 317-319); and that, to assure that the IRS would not discover and disallow the "immediate and drastic" tax savings which petitioners advertised the CFD program would produce, petitioners provided CFD customers with "non-photo blue pencils" for endorsing checks so that banks could not make photographic records of those customers' signatures (C.A. App. 123, 341; GXs 9, 50).

Cir.), cert. denied, 358 U.S. 821 (1958). This is true even though, as petitioners allege, a request was made for Jencks Act material prior to trial and the government, while implicitly representing that it had disclosed all the Jencks material, failed to disclose Rideoutte's report. See *United States* v. *McKenzie*, 768 F.2d 602, 607 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986).

3. Finally, petitioners err in contending (Pet. 27-30) that the court of appeals "blundered" by refusing to allow them to add a new issue to their appeal after oral argument. They argued that the court of appeals should have ordered the disclosure of grand jury transcripts so that petitioners could determine whether the prosecutors misled the grand jury. Apart from the fact that this contention was raised too late in the court of appeals, it is totally without merit. There is no foundation in the record for petitioners' claim that the prosecutors and Agent Rideoutte perpetrated a conspiracy in the District Court and that the activities of these individuals before the Grand Jury were part of a continuing conspiracy. Nor have petitioners even made a threshold showing of why they should be permitted to examine portions of the grand jury record not already provided to them. See *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400-401 (1959) (defendant must demonstrate "a particularized need" for the evidence which outweighs the policy of grand jury secrecy). In any event, even if there were some error in the legal presentation to the grand jury, the petit jury's verdict renders any such error harmless. See *United States* v. *Mechanik*, 475 U.S. 66 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 87-585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURTON D. LINNE, JACK O. SLATER,
and JOHN C. IMLAY IV,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners Burton D. Linne *et alia* hereby reply to the brief in opposition of respondent United States of America.

ARGUMENT

The Department of Justice (DOJ) sets out four contentions, the spuriousness of which points up the crying need for issuance of a writ in this case.

I. False characterization of the question presented.

The issue here is not simply that "Rideoutte's testimony did not completely or accurately reflect all of the information [he] had acquired about the Bullion Fund", but further that that testimony *and prosecutor Conroy's summary of it* presented a picture quite the opposite of what Rideoutte had actually discovered concerning petitioners' roles as "principals" of the Fund. Moreover, the complaint is not simply that, with Rideoutte's report in hand prior to trial, petitioners "could have impeached [his] testimony", but further that that testimony *and Conroy's summary of it* would have been impossible in the teeth of the report—and, indeed, the falsity of the *indictment* would have been apparent, prompting investigation of Grand-Jury abuse, if not dismissal of the prosecution.[1]

Petitioners emphasize *Conroy's summary* and the *indictment* because DOJ mentions them *not all all.* But how could they be other than unmentionable, being undeniable, undefendable, and unpardonable? Yet the very silence that cloaks the covinous Conroy and the illusive indictment bespeaks DOJ's impotence even to color these matters as "legal", let alone to justify them.

In short, its caricature of the question presented evidences DOJ's continuation of the "cover up" at the highest levels.

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[1] *Pace* Brief in Opposition (BO) at 4.

II. Whitewash of Rideoutte's false testimony.

Although close-mouthed about Conroy and the indictment, DOJ waxes fantastic about Rideoutte's testimony.

A. *First*, DOJ says, it was all true.[2] **1.** Were this correct, it would be irrelevant—because, when *Conroy* told the Petit Jury that Rideoutte found only a "mail drop" in the Bahamas and "couldn't find the principals" of the Bullion Fund, and that the jury should infer an "intent to defraud" "through [petitioners'] promotion of the Bullion Fund", *Conroy* was lying.[3]

2. Moreover, it is implausible, because had what Rideoutte told been the *whole* truth, his testimony would have been pointless. *"In support of the allegation that the Bullion Fund was part of petitioners' fraudulent scheme,"* DOJ offers, Rideoutte testified that he "had discovered no evidence that the Bullion Fund was registered (*i.e.*, incorporated) in the Bahamas".[4] That is, the supposed burden of Rideoutte's testimony was the Fund's *formal corporate status in the Bahamas*. How, though, would mere *non*-registration "support" the allegation that the Fund was part of petitioners' "scheme"? Conversely, were the "truth" of Rideoutte's testimony that his truncated investigation in the Bahamas left him unaware of other information elsewhere, his performance was equally meaningless. How could *non*-registration in the Bahamas negate registration in another jurisdiction? No, Rideoutte's testimony was balderdash, *unless* he intended to deceive the Petit Jury into inferring the absence of Bahamian "registration" proved the Bullion Fund a mere "mail drop". And this, of course, is precisely how Conroy—and

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[2] *Id.* at 6: "Nothing in Agent Rideoutte's testimony conflicts with anything in his investigative report."

[3] *Compare* Appendix to Petition at 30a and 33a *with id.* at 10a-12a.

[4] BO at 3 (emphasis supplied).

petitioners' own trial-counsel, too[5]—interpreted Rideoutte's remarks.

3. Even DOJ's pharasaical parsing of the script cannot disguise the duplicity infecting Rideoutte's testimony. At base, DOJ's story is that: (i) Rideoutte's suppressed report contained two sets of facts (Sets A and B, indicating what he did and did not find, respectively); (ii) his testimony related only one set of facts (Set B); yet (iii), notwithstanding its incompleteness, his testimony was "true". Now, even if Set A, viewed in isolation, might arguably support the notion that petitioners were the "principals" of the Bullion Fund, Set B utterly demolishes this idea. But, knowing of the theory the prosecution intended to offer the Petit Jury under color of Set A, and aware that Set B macerated this theory, nevertheless Rideoutte artfully confined his testimony to Set A. *This*, DOJ pretends, is "telling the truth"! In fact—and certainly in the intentions of Rideoutte, Blondin, and Conroy—it amounted to barefaced lies by necessary implication.[6]

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[5] *See* Petition at 13-14.

[6] For example, DOJ applauds how "[i]n both [his report and his testimony Rideoutte] noted that the Bullion Fund was not registered (*i.e.*, incorporated) in the Bahamas". BO at 7. Yet his report identified the circumstances of the Fund's incorporation. Thus, as the Petit Jury heard the testimony—being, with petitioners, deprived of the report—Rideoutte actually said: "I could find *no* evidence of corporate registration *anywhere*." Which was a lie.

Again, smiles DOJ, "[t]he report stated, as Agent Rideoutte had testified, that the telephone company and the post office showed no record" of the Fund. *Id.* at 6. Yet his report identified as holder of the telephone and postal box Anthony Thompson, who knew—and told Rideoutte—everything about the Fund. Thus, as the Petit Jury heard the testimony, Rideoutte actually said: "I could discover *no* link between the telephone and post-office box and the Bullion Fund." Which was another lie.

And again, DOJ purrs, "[i]n both [the report and his testimony, Rideoutte] reported learning nothing about the Bullion Fund from

4. But petitioners need not rest on implications to expose both Rideoutte's perjury and DOJ's moral obtuseness. DOJ claims Rideoutte properly testified that the Bahamian police "had no record" of the Bullion Fund.[7] Bunk. The police discussed with Rideoutte the status of Gordon Briggs, true principal of the Fund. The ones they had "never heard of" were *petitioners*![8] Similarly, DOJ contends "the affidavits [petitioners submitted below] do not in any way rebut Agent Rideoutte's statement that he found no records" of corporate registration for the Fund in the Bahamas.[9] Yet the affidavit of the undersigned counsel recounts how Thompson described registering the Fund with the Central Bank (records of which Rideoutte purloined) and obtaining a business-license for it in the Bahamas.[10]

5. Adding insult to injury, DOJ postures that Rideoutte did not "discuss in his testimony the contents of his interview with * * * Thompson * * * because Rideoutte's account of Thompson's statements would have been hearsay".[11] Oh, true and faithful public servant, punctilious and chary of transgressing the minutest evidentiary rule! Oh, evasive viper—what other than the rankest hearsay

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sources such as the police files, the chamber of commerce, the telephone company, and the post office". *Id.* at 7. Yet, in both his report and testimony Rideoutte referred to contacts with the Central Bank of the Bahamas—*refraining in his testimony*, however, from describing the information he obtained, *much of it illegally*, including "every copy of every bank deposit that went into [the Bullion Fund's] bank accounts in Nassau". *See* Petition at 15, and Appendix to Petition at 12a. Thus, as the Petit Jury heard the testimony, Rideoutte actually said: "The Central Bank never heard of the Bullion Fund." Which was yet a third lie.

[7] BO at 6.

[8] *Contrast* Appendix to Petition at 10a *with id.* at 15a-16a.

[9] BO at 8-9.

[10] Petition at 16.

[11] BO at 7.

was that the Bahamian police, chamber of commerce, and so on supposedly confided in you?!

But, offers DOJ, had Rideoutte related "what Thompson told him, it would hardly have helped petitioners".[12] No? Could Thompson's *denial* that petitioners were the principals of the Bullion Fund have *hurt* them, when that very proposition Conroy was intent on "proving" to the Petit Jury through the lie that Rideoutte "couldn't find the principals"?[13]

In sum, DOJ's screed that Rideoutte told the "truth" may qualify its authors for professorates of evidence at the Pontius Pilate School of Law—but as a basis for denial of this petition it is an intellectual and moral abyss.

B. *Second*, DOJ contends, true or not Rideoutte's testimony was insignificant:

> whether the Bullion Fund was registered in the Bahamas was not of great importance; what was important was that petitioners promoted the Bullion Fund as a legal means * * *, when in fact [it] was simply a means of generating large amounts of cash for petitioners * * *.[14]

However, the thrust of Rideoutte's testimony was not "registration" *vel non*, but existence of the Fund independent of petitioners. Through Rideoutte's "unsuccessful" investigation the prosecutors "proved" the Fund simply petitioners' "mail drop"—and *this* phoney "proof" deceived the Petit Jury into concluding petitioners operated the Fund with knowledge of its illegality.[15]

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[12] *Id.*

[13] Appendix to Petition at 33a.

[14] BO at 9 (footnote omitted).

[15] DOJ may pretend that "the government's evidence * * * showed that the Bullion Fund was not a legitimate investment company"; but no such "evidence", outside of Conroy's deceitful "mail-drop" theory, ever entered the record. *Pace* BO at 10.

Inconsistently, DOJ admits "the Bullion Fund was obviously an important feature of the case". True, as DOJ adds, "the significance of the [Fund] * * * did not turn" on its mere Bahamian corporate status, "which was the only issue addressed" in Rideoutte's testimony.[16] But the prominence of his testimony lies in its uniqueness as the source for Conroy's "mail-drop" canard, which in turn Conroy advanced to conjure up petitioners' "intent to defraud". So, if the Fund itself "was *obviously* an important part of the case", to like degree was Rideoutte's testimony.

Amazingly, though, DOJ then asserts that Rideoutte's failure to discover anyone in the Bahamas who

> knew anything about petitioners * * * was not exculpatory or in any way inconsistent with either [his] testimony or the rest of the government's proof.[17]

Well, *Conroy and Blondin* did not think the truth of the matter consistent with "the rest of [their] case", or "unimportant" as exculpatory evidence. For they systematically suppressed Rideoutte's report and rigged his testimony so that Conroy could later orate that "Mr. Rideoutte couldn't find the principals [of the Bullion Fund]", and importune the Petit Jury to conclude from this that the Fund was petitioners' "mail drop" and their involvement with it "proof" of their "intent to defraud".

C. *Third*, DOJ retreats to the defense that, in any event, the prosecutors elicited evidence other than Rideoutte's testimony.[18] At issue, however, is not whether the jury might have convicted petitioners on *other* (arguably sufficient) evidence, viewed in isolation from the tainted Bul-

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[16] BO at 9 n.5.

[17] *Id.* at 10.

[18] *Id.* at 10-11.

lion-Fund "proof", but whether *that* fraudulent "evidence", and Conroy's venomous argument dilating on it, could *not* have contributed to the verdict *beyond a reasonable doubt*.[19] And nowhere does DOJ even attempt to satisfy this strict standard.

III. Reliance on the success of Rideoutte's fraud to defeat petitioners' Jencks-Act claim.

Because, pretends DOJ,

> there is no support in the record for petitioners' claim that Rideoutte perjured himself * * *, [they] are wrong in asserting * * * that their waiver [of their Jencks-Act right to receive the report] was fraudulently induced.[20]

Now, Rideoutte's false testimony—and particularly Conroy's unconscionable use of it—cannot be gainsaid so easily. But even were these matters debatable, the purported "waiver" of petitioners' Jencks-Act rights would be inadmissible. For the Jencks Act must be strictly construed, and violations thereof "excused only in extraordinary circumstances" where "it is perfectly clear that the defense was not prejudiced".[21] Thus, if there is *any* likelihood petitioners were fraudulently induced—by Rideoutte's testimony, Blondin's characterization of it, and the prosecutors' refusal to satisfy their *pre*-trial duties of disclosure—to "waive" their Jencks-Act rights at trial, that "waiver" must be set aside.

IV. Use of the deception of the Petit Jury to excuse denying investigation of Grand-Jury abuse.

Finally, DOJ opposes inquiry into abuse of the Grand

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[19] Chapman v. California, 386 U.S. 18, 22-24 (1967).

[20] BO at 11.

[21] Goldberg v. United States, 425 U.S. 94, 111 n.21 (1976); United States v. Missler, 414 F.2d 1293, 1303-04 (4th Cir. 1969); United States v. Crowell, 586 F.2d 1020, 1028 (4th Cir. 1978).

Jury for three reasons.[22]

A. *First*, complains DOJ, "this contention was raised too late in the court of appeals". In fact, petitioners broached it *as soon as possible*: immediately after they received the Rideoutte report, on the day of oral argument in that court. Only then did they have hard evidence, in the contents and date of the report, that the indictment was fabricated and therefore that the Grand Jury must have been affirmatively deceived.

B. *Second*, fantasizes DOJ,

> [t]here is no foundation * * * for petitioners' claim * * * that the activities of [Blondin, Conroy, and Rideoutte] before the Grand Jury were part of a continuing conspiracy. Nor have petitioners even made a threshold showing of why they should be permitted to examine portions of the grand jury record not already provided to them.

"No foundation"?! The indictment itself, together with the materials connected with the "letters rogatory", prove that someone defrauded the Grand Jury with Conroy's phoney "the-Bullion-Fund-is-only-a-mail-drop" theory.[23] These documents establish, beyond peradventure, that the prosecutors: (i) suppressed Rideoutte's report; and (ii) presented the Grand Jury with testimony, documents, or both inconsistent with the report—and, therefore, *false*.

C. *Third*, pleads DOJ, "the petit jury's verdict renders any [Grand-Jury] error harmless". Where, as here, systematic violations of the Constitution impermissibly infect the framing of the indicment and, consequently, the very existence, nature, and outcome of the trial-proceedings,

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[22] BO at 12.

[23] *See* Petition at 7.

this argument is bootless.[24] *But for* the abuse of the Grand Jury by the fraudulent Bullion-Fund theory *there would have been no indictment* (as the prosecutors themselves admitted); and *but for* the faked Bullion-Fund allegations in the indictment Rideoutte's mendacious testimony and the perfidious pyrotechnics of Conroy's summary would have been impossible, too.[25] Thus, rather than "curing" the Grand-Jury abuse, the Petit Jury's mistaken verdict was the intended result, and very fulfillment, of it.

CONCLUSION

DOJ's opposition is a sham. For even its lawyers know that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice' ".[26] Yet they persist in victimizing petitioners, in service of what hidden ends inimical to the Constitution one shudders to contemplate. The dark and twisted souls of these conscienceless *fonctionnaires* need our prayers—but, even more urgently, a stinging rebuke from this Court. Let the writ be issued.

Respectfully submitted,

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[24] *Cf.* Vasquez v. Hillery, 474 U.S. ____, ____, 106 S.Ct. 617, 623 (1986).

[25] *See* Petition at 7.

[26] Giglio v. United States, 405 U.S. 150, 153 (1972).